40620

2161/2

VERA DAVIDSON, Administratrix of the Estate of Scott Davidson, Jr., deceased,

(Plaintiff) Appellant,

v.

A. A. SPRAGUE and BRIXTON I. RUDD, as Receivers for Chicago Rapid Transit Company, a corporation,

(Defendants) Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

305 I.A. 157

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action at law based upon the attractive nuisance theory by the plaintiff, administratrix, against the defendants to recover damages for the wrongful death of Scott Davidson, Jr., a child less than ten years of age. At the conclusion of the plaintiff's case the court directed the jury to return a verdict in favor of the defendants, and it is from this judgment entered pursuant to said verdict that the plaintiff appeals.

The pleadings allege that the defendants were operating elevated trains near the intersection of Virginia Street and Leland Avenue in the City of Chicago, at substantially ground level and that at the said place there was a public playground immediately adjacent to the right-of-way and that the defendants' trains were propelled by electricity, receiving the electricity from an exposed third rail; that on June 15, 1935 a barrel containing spikes was situated on the right-of-way between the second and third rails of two separate tracks and that the plaintiff's intestate, a boy of nine years and seven months, went upon the premises, attracted by the spikes and the railroad, etc., and came to his death by coming in contact with said third rail; that the defendants were negligent in view of the attractive nuisance aforesaid by maintaining an improper fence around said premises, said fence being a so-called hog wire fence, that is to say, having meshes in which the strands run vertically and horizontally with strands more than three inches

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apart, forming, a virtual ladder for children to climb over.

The defendants filed an answer denying the material allegations except the ownership of the premises, the operation of the trains, the death of the plaintiff's intestate and the heirship of the latter.

The facts that appear from the evidence are the defendants operated what is commonly referred to as the Elevated Railroads in Chicago. The undisputed evidence tends to show that the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from a keg. Immediately adjacent to defendants' right-of-way there is now and has been for more than twelve years last past a public playground where children are accustomed to play, which playground has a fence on only three sides, but from which children have access to the adjoining right-of-way. The particular vicinity is in a thickly settled residential district of Chicago. The plaintiff's witness Owen, a boy who was with plaintiff's intestate, testified that "Three of us boys went up on this bank of dirt, and Scott, the boy that was killed, went over to the keg. He reached down into the keg and took some railroad spikes, then he brought the spikes over to his brother Charles. * * * Then he went back to get some more spikes out of the keg. A train was coming and he started to run. He tried to get away. He tripped over the third rail." The younger brother of plaintiff's intestate testified: "My brother went over the fence and up the bank to get the spikes. He came back and gave me some spikes and then went up the bank again to get some more spikes. I guess he got excited and started to run and tripped."

The accident happened upon the defendants' railroad tracks between Virginia Avenue and the north branch of the Chicago River. At the point of the accident the railroad tracks run east and west upon an embankment. North of the tracks Virginia Avenue runs in a

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The accident happened upon the defendants' railroad tracks between Virginia Avenue and the north branch of the Chicago River. At the point of the accident the railroad tracks run east and west

northwesterly direction. There are no streets running north and south between the river and Virginia Avenue. Virginia Avenue ends at the railroad right-of-way. Immediately north of the right-of-way and west of Virginia Avenue is a triangular piece of ground. At Virginia Avenue this triangular piece is 40 feet wide and tapers toward the west to about five feet wide at the river. This triangular piece is bound on the east by Virginia Avenue, on the north by a playground park, and on the south by a right-of-way fence and on the west by the river. The size of this park is 150 feet north and south by 135 feet deep. Surrounding this playground is a hog wire fence 48 inches high, that is, the strands run vertically and horizontally, in which the square meshes are about 4 by 6 inches apart, it is suggested by the plaintiff that it serves virtually as a ladder. In some places along the right-of-way there is a barbed wire, but there is no wire directly opposite the playground. The right-of-way is perfectly visible from the playground immediately to the north. This right-of-way consists of two tracks, one an eastbound and one a westbound track, with a special live third rail paralleling each track. On Saturday, June 15, 1935, about 3 P.M., about four years ago, the plaintiff's intestate, a boy nine years and seven months old - born October 23, 1925 - together with three or four other little boys were opposite the right-of-way. They had played there before. On this occasion from off the defendants' right-of-way they saw a barrel of spikes between the tracks. These boys were, George Edwin Owen, Jr., nine years old, Charles Davidson, a brother of the deceased, eight and one-half years old; both of whom were witnesses, and Jack Gasparo. They climbed over the fence at a point about 30 feet east of the bridge. The barrel of spikes was about 25 feet east of the bridge. Charles Scott, however, went through a hole near the bridge. Surrounding this playground on the south, west and north was a small mesh wire fence, 6 feet high.

At the time of the accident the plaintiff's intestate lived with his parents at the northeast corner of Giddings Street and Virginia Avenue. They formerly had lived on Leland at Rockwell. Prior to that they had lived in an apartment back of the father's office at Rockwell and Leland. Plaintiff's intestate had been going to school for 3-1/2 years. He was a bright boy and had a good standing in school. The tracks cross Rockwell Street on the ground and there was a third rail near the sidewalk and a sign reading, "Danger - Electric Current - Keep Out". Plaintiff's intestate had to cross the tracks at Rockwell from the street where his parents lived, in going to and from school for 3-1/2 years. There was a sign reading, "Danger - Keep Out" at the tracks at the foot of Virginia Avenue. Both parents cautioned plaintiff's intestate not to go on the right-of-way. His brother testified: "I guess he got excited and started to run and tripped. In going over to the keg he stepped over the third rail and in coming back from the first trip he also stepped over the third rail". The Owen boy and the brother of plaintiff's intestate gave substantially the same testimony as to how the accident happened.

The defendants' contention is that it was a necessary element of plaintiff's case to show that plaintiff's intestate was rightfully at the place where the accident happened and was not a trespasser upon the premises of the defendants. Otherwise the defendants owed him no duty, except to refrain from wilfully injuring him. This rule is thoroughly established as the law of this state applicable to attractive nuisance cases as well as others. The defendants point to the case of Zelczek v. Public Service Co., 342 Ill. 482, where the court said:

> "It is likewise the rule that the owner of private grounds is under no obligation to keep them in any particular state or

At the time of the incident the plaintiff's interests lay with the private or the northern society of Indians (Cree and Tsimpsian groups). They therefore had learnt as children to speak prior to their entry into land in an unwritten code of the Indians affect in contrast and manner. Plaintiff's interests had been making in school for 5-6½ years. He was a prize boy and a good standing in school. The trouble began when unknown events in the school and there was a white fall over the children and a sign reading, "Indian - Indian school - Keep out". Plaintiff's interests had to cease and breaks in school from the school years his parents lived, in going to and from school for 3-4½ years. There was a sign reading, "Indian - Keep out" at the trends of the back of Indian reserve. This property restricted plaintiff's interests and to go on the right-of-way. His training restricted. "I guess he had said nothing and allowed to was not friends". In going away to the bag he stopped when the latter will and in doing that then the first step he also stopped when the right road. The time log and the testimony of plaintiff's interests were unsatisfactorily for such testimony as to have the material happened.

The Intermediate contention is that it was a proximate element of plaintiff's case is also that plaintiff's interests are responsible of the place where the incident happened and was not a trespasser upon the premises of the Dominion. Otherwise the defendants used his on duty, except in relation from duties injuring him. This was in Vancouver interested in the fact of this state acquiescing to alternative measures means as well as injury. The Intermediate refers to the case of Indian v. Indian Interest Co., 1941 III. 161, where the court said:

"It is interesting the rule that the owner of premises owes to a trespasser the duty of not wilfully or wantonly injuring him, or of not exposing him to a danger of which he is aware, or of which he should be aware, and of which he has no reason to apprehend that the trespasser will be exposed to it."

condition to promote the safety of trespassers, intruders, idlers, bare licensees, or others who come upon them without invitation, either expressed or implied. This rule applies equally to adults and children."

The court further states in this case:

"The rule recognized in this state as to implied invitation is, that where the owner of the premises maintains a dangerous condition or thing of such a character that he may reasonably anticipate that children, who by reason of tender years are incapable of exercising proper care for their own safety, are likely, because of their childish instincts, to be attracted to the dangerous thing and thereby exposed to dangers, he is required to use reasonable care to protect them from injury, provided it is shown that such dangerous condition or thing is so located as to attract children from the street, playground or place where they have a right to be. Where such an agency is so located it constitutes an implied invitation to such children to come upon the premises and they are not, in law, considered trespassers. The rule does not apply where the owner maintains something for his own use which, though dangerous, would be found by such children only by going upon the premises as trespassers. In other words, to impliedly invite children onto the premises it is necessary that the dangerous agency, with its alluring and attractive character, be so placed as to attract the children there. (McDermott v. Burke, 256 Ill. 401; St. Louis, Vandalia and Terre Haute Railroad Co. v. Bell, 81 Ill. 76.) If there is such an implied invitation to go upon the premises the child is not considered, in law, a trespasser but an implied invitee."

The defendants in their brief state that the undisputed evidence shows the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from the keg, and upon this question George Owen, Jr., a boy 9-1/2 years old testified:

"We climbed the fence nearest Lawrence Avenue on the north side of the track. It was near the playground. We had played on the playground, the one just north of the elevated tracks before this Saturday, and that Saturday afternoon we saw a barrel of spikes on the railroad. You could see the barrel before you crawled over the fence. It was between the two third rails. On this afternoon Scottie went to get some spikes and then, I think he brought them back to get some more spikes. I think a train was coming and he got scared and he tripped on the third rail."

It would seem from defendants' own brief, from which we have just quoted, that the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from the keg.

The trial judge made this statement in directing the verdict:

> "I do that as a matter of law under the evidence, and on the ground that, in my opinion, under many decisions of this state and of other states, there has been no attractive nuisance proved by the plaintiff that would tend to allure a child of tender years to go upon the track."

and this, of course, is the issue here. The evidence clearly establishes that the fence was about 4 feet high of woven wire, consisting of vertical wires about 6 inches apart and horizontal wires about 4 inches apart, and that there was no other obstruction than the 4 foot fence. This was corroborated by witnesses.

In order to properly consider this question it might be well to be guided by the expressions of the courts of appeal as to what is an attractive nuisance and what is the duty of the owner or person in control of lands and buildings to protect children from injury.

In the case of Oglesby v. Metropolitan West Side El. Ry.Co. 219 Ill. App. 321, where children went into an elevator building upon the premises of the defendant, which was not properly protected, we said:

> "We do not agree with the contention that the elevator cannot as a matter of law come under the doctrine of the attractive nuisance cases. Attractive nuisances have been defined to be such things causing injury, left exposed and unguarded, which are of such a character as to be an attraction to children, appealing to their childish curiosity and instincts. 'The owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they being without judgment and likely to be drawn by childish curiosity into places of danger are not to be classed with trespassers, idlers and mere licensees.' City of Pekin v. McMahon, 154 Ill. 141."

So, when we come to apply this rule to the facts as they appear from the evidence of the plaintiff, we find that the right-of-way of the elevated railroad, the defendants in this case, was fenced. In other words, it had a fence four feet in height along its right-of-way to prevent persons from traveling upon it.

In the case of Seymour v. Union Stock Yards Co., 234 Ill. 579, the appellant was attracted by a pile of clay along the railroad

track. He went upon the pile to play and while so engaged was in no danger. As the train passed, the boy no longer attracted by the bank of earth, began touching, playing with and running alongside the slowly moving cars, and finally fell under them, sustaining the injury complained of. The court there said:

> "Here an element intervened between the acts induced by the allurements of the clay pile and the injury, viz., the movements of the boy in placing himself in contact with and in running alongside the cars."

In further discussing the question involved, the court said:

> "The proximate cause of the injury in this case was not the pile of clay, nor any danger with which the boy was brought in contact while gratifying any curiosity or desire excited by that pile. The injury was proximately caused by the movements of appellant in placing his hands upon and in running alongside the cars."

In the case of Ramsay v. Duthill Material Co., 295 Ill. 395, the court held that if one engaged in any operation dangerous to those coming in contact with it permits children who are incapable of appreciating the danger to come upon the premises and expose themselves to danger, he must take such means to prevent injury to them as will be effective or exclude them from the premises.

So it is the rule that where premises become attractive to children it is the duty of the owner of the premises to take such steps to protect the children if they are permitted upon the premises, or to barricade or fence the premises so that the children will not be able to come upon the premises, and if they do so by climbing such barricade or fence they become trespassers and an action will not lie for any injury that may be suffered by the child under such circumstances, unless there was a wilful or wanton act by the owner which would justify a judgment for injuries sustained by the child.

But when we come to consider the instant case, the purpose of the plaintiff's intestate, after climbing the fence and getting

upon the right-of-way of the defendants, was - as suggested and argued - to get some railroad spikes out of a keg which it is claimed was attractive to children and which was near the place in question. The child did get the spikes and gave them to his brother, who also had crawled through an opening upon defendants' track, and returned for the purpose of getting more spikes, when, as the facts indicate, he heard an elevated train coming and in order to avoid this train he started to run and tripped over the third rail, which carries the electricity to operate the road, and was killed by the electric shock, so that the fact that he was attracted by his curiosity to obtain spikes and did get them, was not really the proximate cause of the injury, but his running and tripping over the third rail, and upon this question it might be well to consider what our courts have said.

In the case of Simons v. Pole Valve Co., 288 Ill. App. 288, the case involved the question of a double gate which opened and permitted entrance into the defendant's premises. The plaintiff contends that the gates in the fence around the defendant's premises, by reason of their massive and peculiar construction and the fact that they were always open, unlocked and unguarded, although there was a lock on the gates which was never used, and by reason of the further fact that the children in the neighborhood were allowed to play on the gates and on defendant's premises unhindered and were never forbidden to play on the gates and on defendant's premises, it was incumbent on the defendant to prevent the maintenance of a dangerous instrumentality upon its premises by means of which children of tender age might be injured, and upon the question of liability this court said:

"It is essential in order to prove the liability of one who maintains a so-called attractive nuisance, that the thing which attracted the child upon the premises, or something

inseparably connected therewith, be the proximate cause of the injury. As the Supreme Court said in the case of McDermott v. Burke, 386 Ill. 401, 408: 'It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises which the owner should anticipate.'

The evidence in this case shows that the boy was not attracted by the so-called gate; that he was not standing on it nor playing with it as is charged in the complaint.

A gate is not inherently dangerous and there is no proof in this case as to who opened the gate or that the defendant knew that the gate was open, or who moved the gate at the time the boy's fingers were injured."

It necessarily follows that the plaintiff's evidence does not establish a cause of action and the trial court did not err in directing the jury at the close of plaintiff's case to find the defendants not guilty and in entering judgment upon such finding. The judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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| VERA DAVIDSON, Administratrix of the Estate of Scott Davidson, Jr., deceased, Plaintiff-Appellant, v. A. A. SPRAGUE and BRITTON I. BUDD, as Receivers for Chicago Rapid Transit Company, a corporation, Defendants-Appellees. | APPEAL FROM SUPERIOR COURT COOK COUNTY. |

305 I.A. 157

ON REHEARING

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This court filed an opinion in a suit which was pending here on appeal by the plaintiff, Administratrix of the Estate of Scott Davidson, Jr., deceased, from a judgment for the defendants in an action by the plaintiff to recover damages by reason of the negligence of the defendants in causing the death of the deceased.

The plaintiff filed a petition for a rehearing upon the ground set forth in the petition. The petition was allowed and thereafter the defendants filed an answer thereto.

After consideration of the questions that were involved and called to our attention, we have reached the conclusion that the court will modify its opinion by striking out on the second page of the opinion after the words three sides, "but from which children have access to the adjoining right-of-way," so that the language will appear as follows:

> "The facts that appear from the evidence are the defendants operated what is commonly referred to as the Elevated Railroads in Chicago. The undisputed evidence tends to show that the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from a keg. Immediately adjacent to defendants' right-of-way there is now and has been for more than twelve years last past a public playground where children are accustomed to play, which playground has a fence on only three sides."

And further, that we will adhere to the opinion herein as modified.

This petition, incorporating by the
Table of Bank Deposits, Pr., filedand
Publication/notice.

4. In regard the prior 1. 2. 3.
Concerns the Exercise Well Tenants
Concept, a [illegible]
[illegible]

3. Decision

Mr. Justice Black, delivering the opinion of the Court.

This court filed no opinion in a suit which was pending here on appeal by the plaintiff, Administrator of the Estate of Isaac Wolfson, Jr., Deceased, from a judgment for the defendants in an action by the plaintiff to recover damages by reason of the negligence of the defendants in causing the death of the decedent.

The plaintiff filed a petition for a rehearing upon the ground set forth in the petition. The petition was filed and thereafter the defendants filed an answer thereto.

After consideration of the questions that were involved and called to our attention, we have reached the conclusion that the court will modify its opinion by striking out on the second page of the opinion after the words there cited, "but from such decisions in the adjoining right-of-way," so that the language will appear as follows:

> "The facts that appear from our reviews are the defendants operated what is commonly referred to as the Ivorted Railroad in Delaware. The undisputed evidence tends to show that the plaintiff's decedent climbed the fence and sank upon the tracks only to get quites from a dog. Immediately adjacent to defendant' right-of-way there is now and has been for more than twelve years just west a public playground where children are accustomed to play, which circumstance has a tendency to only three sides."

and further, that we will adhere to the opinion herein as modified.

The judgment entered for the defendants is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J.
BURKE, J. CONCUR.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A.D. 1939.

Abstract

TERM NO. 7 AGENDA 16

| | | |
|---|---|---|
| GEROLD MOVING & WAREHOUSE CO., a Corporation, Appellee, | ) | Appeal from The City Court |
| vs | ) | of |
| POTOMAC INSURANCE COMPANY of the District of Columbia, Appellant. | ) | The City of East St. Louis, Illinois. |

305 I.A. 157

STONE, P. J.

On June 19, 1937, the defendant through its general agent, who was a neighbor of and well acquainted with the president of appellee, issued an insurance policy to appellee covering six automobile truck bodies of a moving van type against loss by fire. Said policy was in full force and effect on the 27th day of January, 1938. On that day a fire broke out in a building of appellee wherein four of the trucks so covered were garaged and the four trucks were totally destroyed by fire and the resultant cave-in of the building. Appellant refused to pay on the policy. Appelleebrought this suit to recover the amount of his loss. Each party is a corporation. When the suit was brought appellant undertook to defend on two grounds: first, that the proof of loss was not delivered to appellant within the time prescribed in the policy,- that is sixty days from the date of the loss; secondly, that that which appellee claims was a proof of loss was not properly verified as prescribed by the policy.

A trial was had before a jury; the jury found the

issues for the plaintiff and assessed its damages at the sum of Five Thousand Dollars. Motions for directed verdict and for new trial were overruled by the court, and appellant brings this appeal, urging the two defenses urged in the trial court.

On the 28th day of March following the fire, appellee delivered to the authorized agent of appellant its proof of loss. Eliminating the first day, that is January 27th, the day the fire began -- the fire burned for two days,- the proof of loss delivered on March 28th, 1937, was within sixty days from the time of the loss according to any well known and established system of calculation and according to our Statute on that subject. (Revised Statutes 1937, Chap. 131, Par. 1; Chap. 100, Par.6). Appellant undertakes to divide this time up into hours and show that the necessary hours to make sixty days had more than intervened. This unique method of calculating time is not only in defiance of our Statute, but is such a method which under the circumstances which obtain here we would not consider at all unless we were positively constrained to do so by substantial authority. This we do not find. In our judgment there is no question but what this proof of loss was delivered on time. Furthermore, it was delivered to the agent who wrote the policy and who was a close neighbor of the president of appellee. The agent received this, made no complaint or objection or suggestion, and delivered it to appellant. This agent was general agent of appellant; he wrote the policy; he came to the fire on the morning of the fire; he knew all about the situation and all about plaintiff-appellee and its activities.

The second contention is that the proof of loss was

not properly verified as the contract of insurance prescribed that it should be, and was, therefore, insufficient to amount to a proof of loss, and for that reason the court should have instructed the jury to find the issues for the defendant.

The proof of loss was signed "Gerold Moving and Warehousing Co. by E. F. Gerold", and the affidavit thereto was executed by Mr. Gerold. In German Fire Insurance Company vs Grunert, 112 Ill. 68, the Supreme Court had before it an affidavit to an insurance proof of loss very similar to the one at bar, and in passing on the signing of the proof of loss, where the same objection is made, said that the objection to such proof is hypercritical. We are inclined to the same belief as to this objection. Appelle had been in business for many years in East St. Louis. Mr. Gerold the president thereof, and Mr. Hanson the general agent of appellant had been acquainted for approximately thirty-five years, and as said before, they were neighbors. Hanson had written the policy in question. His place of business was one block from the place of business of appellee. Together these two men discussed the question of the fire and loss, and in general the record shows that no person other than Mr. Gerold was recognized by Mr. Hanson or by Mr. English, another agent of the defendant company, as having any official identity with appellee. Under no circumstances could appellant have been injured by the failure of Mr. Gerold to write the word "President" after his signature to the affidavit. In Globe Mutual Life Insurance Association vs March, 118 Ill. App. 261, appellee swore to the proofs of death personally instead of as executor and upon objection thereto the court said at page

180, "The addition of the word 'executor' to his signature was a useless act" with the prefacing remark "The objections to the proof is extremely technical". In Templeton vs Hayward, 65 Ill. 178 at page 180 our Supreme Court said "It may be usual in executing instruments by corporations for the officer or agent to sign his name under that of the company as evidence that it is executed by the person having authority. Still such a signature is by no means essential."

In this case the proof was signed by the appellee company; it was prepared by Mr. Gerold, its president, and by him handed to the general agent of appellant. That agent knew Mr. Gerold was president of plaintiff company, and the addition of the descriptive words would not have given him any information that he was not already in possession of.

It is next urged that the verdict is excessive. The jury heard the evidence and made its finding. The trial judge was in a much better position to determine that question than this court.

There was no substantial defense to this lawsuit. The judgment of the City Court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A.D. 1939

Abstract

TERM NO. 10 AGENDA NO. 9

| | |
|---|---|
| WILLIAM McGUIRE, CHARLES McGUIRE, CARL McGUIRE, KENNETH McGUIRE, and EVERETT McGUIRE, Minors, by FRED McGUIRE, their next friend, and HOMER McGUIRE, Plaintiffs in error | Error to the Circuit Court of Marion County. |
| vs. | |
| MERCHANTS STATE BANK OF CENTRALIA, ILLINOIS TRUSTEE, and E. T. JOHNSON, Defendants in error | |

305 I.A. 158

STONE, P. J.

This case comes to this court by way of a writ of error sued out to review a decree of foreclosure entered by the Circuit Court of Marion County on November 12, 1932. The bill for foreclosure was brought by the Merchants State Bank of Centralia, Illinois, as trustee in a trust deed in the nature of a mortgage, and E. T. Johnson, as the holder of a note against Homer McGuire, one of the makers of the note, (the other joint maker, Anna McGuire, wife of Homer McGuire, being deceased,) and William McGuire, Charles McGuire, Carl McGuire, Kenneth McGuire, and Everett McGuire, minors, the children of Homer McGuire and the deceased, Anna McGuire. The bill for foreclosure alleged in substance that Homer McGuire and Anna McGuire had executed a note and mortgage; that the note was past due and that $1282.60 remained due thereon; that Homer McGuire and Anna McGuire were tenants in common; that the latter died intestate, and that she left surviving, her husband and five named children as her heirs, and prayed for a foreclosure.

Upon filing of the bill, a summons was issued, directed to the Sheriff of Marion County, for all of the defendants in the cause, returnable on the fourth Monday in September, 1932. The return of the Sheriff on this summons shows that it was served on Homer McGuire on September 2, 1932. The return further shows that it was served upon William McGuire, Charles McGuire, Carl McGuire, Kenneth McGuire and Everett McGuire, minor defendants, by leaving a copy thereof for them at their usual place of abode, with Homer McGuire, a person of the age of ten years and upwards and a

member of the family of said minor defendants. A guardian ad litem was appointed by the court for all minor defendants and he filed a formal answer, neither admitting nor denying any of the allegations of the bill, but submitting the rights and interests of the minors to the protection of the Court. Default was entered as to all adult defendants and the cause referred to the Master to take and report testimony. The Master duly filed his report, cause was heard, and a decree for foreclosure and sale was entered and thereafter the premises were sold, and one of the complainants, E. T. Johnson was the purchaser at said sale.

Thereafter this writ of error, was sued out by William McGuire, Charles McGuire, Carl McGuire, Kenneth McGuire and Everett McGuire, who are still minors and who prosecute this writ by Fred McGuire, their uncle and next friend. Their father, Homer McGuire, enters his appearance and becomes a party plaintiff to the writ of error.

In this court, motion was made by E. T. Johnson, defendant in error, for leave to:

1. File attached suggestions of the transfer of interests of the defendant in error;
2. For dismissal of the writ of error; or in the alternative
3. For substitution of new parties as defendants in error;

and

For the transfer of said cause to the Supreme Court; and in aid and support of said motion presented certain attached suggestions supported by affidavit.

Charlie E. Richardson and The Texas Company, a corporation, parties named in the suggestions therein, asked leave to intervene in this cause and to adopt the suggestions and motion of the defendant in error, E. T. Johnson.

And in this court also, motion was made by James Hailey and Fred Sample for leave to file suggestions of transfer of interests by defendant in error.

No provision was made under the Practice Act of 1907 for substitution of parties or for suggestions, supported by affidavit, as are now provided for, by the Civil Practice Act, and by the rules of the Supreme Court and Appellate Court. The repeal section of the Civil Practice Act, provides that it shall not impair or affect any action or proceeding commenced before the act takes effect. In view of the foregoing and the fact that this writ

of error is for the purpose of reviewing the decree of November 12, 1932, we are of the opinion that the sections of the Civil Practice Act relied upon by the defendants in error do not apply, and all these motions as above, are denied.

The principal contentions of the plaintiff in error upon the errors assigned were:

First: That the interest of Homer McGuire in the suit, one of the joint makers of the note was in conflict with and opposed to, the interest of the minor defendants and that service on the minors by leaving a copy of the summons with said Homer McGuire, was not good service on the minors.

Second: That the decree was entered solely upon the testimony of the complainant who was wholly incompetent as a witness because all of the defendants in the case were defending as heirs at law of Anna McGuire, deceased.

Third: That the note evidencing the indebtedness secured by the mortgage which was foreclosed shows on its face, as offered in evidence, that it had been paid in full prior to the time the suit was brought.

Fourth: That the guardian ad litem did nothing in the case except to file a formal answer, and took no steps to protect the interests of the minors;

Fifth: That the Court had no jurisdiction to enter the decree because it did not have jurisdiction of the minors who were necessary and indispensable parties to the suit.

We believe that the first question, that of the sufficiency of service upon the minors involved, is the only serious question herein involved. The return of the sheriff showed service upon all minors by leaving a copy of the summons at their usual place of abode, with Homer McGuire, a person of the age of ten years and upwards and a member of the family of said minor defendants, which return follows the language of the statute in force at the time this service was made. It is contended by plaintiffs in error that the interests of Homer McGuire, the adult defendant and of his children as co-defendants were adverse and rely principally upon the cases of Sharp vs. Sharp 333 Ill. 267; Heppe vs. Szepanski 309 Ill., Manternach vs. Studt 230 Ill. 356 and People vs. Feicke 252 Ill. 414, in support of their contention.

In the Sharp case, the issue involved in the pleadings was whether the father, with whom summons had been left for his minor children, took the entire interest in the property, to the exclusion of his children. There the Supreme Court held that a copy of the summons for a minor defendant could not be left with a person who though not a nominal complainant, is a party interested and benefited by a decree granting the prayer of the bill filed.

In the case of Mantornach vs. Studt, the court held that service upon the mother of a minor who was the creditor for whose benefit the property in question was sold and while not the nominal complainant, was the real party in interest, and stood in the position of complainant, was not good.

The Feicke case, in which the rights of minors were not involved, was a petition in a quo warranto proceeding, where there was an attempt upon the part of one of the petitioners to serve a copy of the petition and notice, upon a board of directors, by serving himself, as clerk of the board, and is not in point.

In the case at bar, while there may have been a difference of interest in degree in the equity of redemption the pleadings do not indicate any adverse interest, as between the father and the minor children. Their interest in this court seemed to be not in conflict, as they all join in the writ of error. If as contended by plaintiffs in error the note was paid, it would be to the interest of all to defend; if not paid, the mortgagee would have the right to foreclose the mortgage and sell the entire interest in the mortgaged property, regardless of ownership. We find no conflict of interest, as in the Sharp case and the Hoppe case. The sheriff's return is the basis for a presumption that he performed his duty. That presumption to be overcome must be determined upon the face of the record. Sharp vs. Sharp 355 Illinois 267. Upon careful examination of this record, we find no such conflict of interest, as would invalidate the service upon these minors, and divest the Circuit Court of Marion County of jurisdiction.

The fourth contention of the plaintiffs in error, that the guardian ad litem did nothing in the case except file a formal answer and took no steps to protect the interests of the minors or to call the facts in the case, which would have constituted a defense to the action to the attention of the court, follows in logical sequence with the first question

raised, that of proper service upon the minors herein involved. If there was any conflicting interest, as between the father and the minor children, as contended by plaintiffs in error, it would necessarily follow that that conflict of interest, should have been called to the attention of the court. As that question has been disposed of by our ruling upon the question of service, we do not feel constrained to hold that the guardian ad litem was derelict in his duty to his wards.

It is contended by plaintiff in error that the note evidencing the indebtedness secured by the mortgage which was foreclosed shows on its face, as offered in evidence, that it had been paid in full, prior to the time the suit was brought, and that the decree in question was entered solely upon the testimony of the complainant in the lower court, E. T. Johnson, who it is claimed was wholly incompetent and disqualified as a witness because all of the defendants in the case were defending as the heirs at law of Anna McGuire, deceased.

As to the first contention, the rule that a receipt in full is not conclusive and may be explained or contradicted is well established. Ditch. Admr. v. Vollhardt 92 Ill., 134, Estate of Switzer v. Gertenbach, 122 Ill. App., 26. Johnson testified that it was not paid. The adult defendant, Woner McGuire, joint maker of the note had every opportunity to present evidence to rebut the testimony of Johnson as to non-payment in full of the note, and apparently did not see fit to do so. This court does not feel called upon to weigh the testimony with reference to payment. And we do not feel called upon to pass upon the competency of the witness Johnson, with reference to the second proposition. In the absence of a bill of exceptions or certificate of evidence, it will be presumed that the findings were warranted by the proofs heard by the Court. In the absence of a certificate preserving all the evidence heard by the trial court, it must be presumed that there was sufficient evidence to warrant and sustain the finding. Hannas v Hannas, supra; Greenendyke v Coffeen, 108 Ill. 334; Shoen v Hogan, 86 id. 16; Davis v American and Foreign Christian Union, 100 id. 313; Morgan v Cordies 81 id. 72; McIntosh v Saunders, 68 id. 128; Rhoades v Rhoades, 88 id. 139; Walker v Cary, 53 id. 470; Allen v LeMoyne, 102 id. 26; Mauck v Mauck, 54 id. 281; Walker v Abt, 83 id. 236; Corbus v Teed, 69 id. 205; Brown v Miner, 128 Ill. 148; Op. 156 Allen v Henn, 197 Ill. 486, Op. 491-2 and cases there cited.

For the reasons indicated above, the writ of error will be dismissed.

STATE OF ILLINOIS Abstract

APPELLATE COURT

OCTOBER TERM

A.D. 1939.

No. 29 AGENDA 24.

| | |
|---|---|
| GEORGE WEINHAGEN, Jr., Administrator of the Estate of ALBERT WEINHAGEN, Deceased, Plaintiff-Appellee, | Appeal from the Circuit Court of Williamson County. |
| vs | |
| CITY OF HERRIN, an Illinois Municipal Corporation, Defendant-Appellant. | |

STONE, P. J. 305 I.A. 158[2]

This was a suit on bonds Nos. 15 to 20 inclusive, of an issue in virtue of ordinance No. 90 providing therefor, passed by the city council of appellant on March 8, 1909. Some two or three ordinances for the purpose of amending ordinance No. 90 were passed from time to time after July 1st, 1909, but an examination of these ordinances shows that no substantive changes are made in the tenor or effect of ordinance No. 90. They were simply made to clarify and make understandable the first ordinance.

Appellant through the years has paid bonds of this issue Nos. 4 to 14 inclusive, together with interest thereon. It undertakes to defend this suit notwithstanding the payments above indicated by saying that there was no Yea and Nea vote taken at the time ordinance No. 90 was passed and that said ordinance was never submitted to a vote of the citizens of appellant as prescribed by an act which went into effect July 1st, 1909,- months after the ordinance allowing the issue of bonds had been passed and approved by the city council of appellant. It requires but a glance to see that the act passed July 1st, 1909 requiring such

ordinance to be submitted to a vote of the people could not effect this ordinance. The bond issue comes by authority of the ordinance and the physical act of executing and signing the bonds does not govern. (McQuillan on Municipal Corporations, Vol. 5, page 4847, Section 2297; Chickaming Township vs Carpenter, 166 U. S. 663).

As to the Yea and Nea vote the record on that subject shows but one person absent from the city council and that the ordinance was unanimously passed. At this time and down until 1924 this was tantamount to a Yea and Nea vote. (Barr vs Village of Auburn, 89 Ill. 361). This case remained the law of the state on that subject until 1924,- that is, fifteen years after the issue of bonds here in question.

Neither of these contentions can prevail, as it seems to us perfectly obvious. Having taken that view, we regard it as unnecessary to discuss here the question of the city's being estopped to take the position it now takes. We might add, however, without deciding that question, the law of which seems to be well settled, that the city in this case ought to be estopped from denying this honest obligation the value received of which it has had, lo, these many years.

The trial court ruled correctly on this matter and its judgment in that regard is affirmed.

JUDGMENT AFFIRMED.

## Abstract

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1939

Abstract

Term No. _____ Agenda No. _____

Earl Williams,
Plaintiff-Appellee,
vs.
Bertha Kraper,
Defendant-Appellant.

Appeal from the
Circuit Court of
Franklin County, Illinois.

305 I.A. 159

Dady, J.

The plaintiff, Earl Williams, who is the appellee herein, filed his complaint in forcible detainer before a Justice of the Peace against the defendant, Bertha Kraper, who is the appellant herein, to recover the possession of certain premises located in the City of West Frankfort, Illinois. The defendant, after service of summons on her, appeared and at her request was granted a change of venue to another Justice, who tried the case on May 5, 1939, and entered judgment on that date in favor of defendant. Plaintiff, with a surety, executed an appeal bond in the amount of $50.00, which bond was filed with and approved by the Justice on May 5, 1939. The transcript of the justice and the appeal bond were filed in the circuit court of Franklin County on May 17, 1939, and on the same day the defendant filed in the Circuit Court her demand for a jury trial. On June 28, 1939, the cause was called for trial and the defendant then moved to dismiss the appeal, which motion was denied and the cause proceeded to trial resulting in a judgment in favor of plaintiff. This appeal followed.

Defendant contends that the Circuit Court did not acquire jurisdiction of the appeal from the Justice of the Peace and erred in denying her motion to dismiss for the reason that the transcript

The plaintiff, Earl Williams, who is the appellee herein, filed his complaint in Tuscola Circuit Court before a jury against the defendant, Harvey Stoner, who is the appellant herein, to recover the proceeds of certain personal insurance in the City of West Frankfort, Illinois. The defendant, after service of summons on him, appeared and at his request was granted a change of venue to another Justice, who tried the case on July 8, 1959, and entered judgment on that date in favor of Plaintiff, with a mortgage, assessed as equal that in the amount of $[illegible], which bond was filed with and approved by the Justice on July 8, 1959. The transcript of the pleadings and the appeal bond were filed in the circuit court of Franklin County on July 17, 1959, and on the same day the defendant filed in the Circuit Court his motion for a jury trial. On June 30, 1959, the court was asking the trial but the defendant then moved to dismiss the appeal, which motion was denied and the case proceeded to trial resulting in a judgment in favor of Plaintiff. This appeal follows.

Defendant contends that the Circuit Court did not acquire jurisdiction of the appeal from the Justice of the Peace and erred in denying her motion to dismiss for the reason that the transcript

from the Justice of the Peace fails to show that the plaintiff prayed an appeal or that the Justice fixed the amount of the appeal bond. This contention is without force. The appeal bond was in fact entered into by the plaintiff and his surety and was filed with the Justice and approved by him within the statutory period of five days after the entry of the judgment.

The entering into and presentation to the Justice of the appeal bond for approval was all the praying for an appeal that was necessary, and the approval of the bond by the Justice was a sufficient fixing of the amount. (Fix v. Quinn, 75 Ill. 232; Enright v. Rehbach, 133 Ill. App. 50; Natenberg v. Solak, 174 Ill. App. 443.)

The fact that an appeal was or was not prayed on a certain day may be shown by evidence other than the entries on the justice's transcript. (Lambert v. Dabbs, 302 Ill. App. 400; Cochren v. Sweigle, 213 Ill. App. 594.)

Moreover, as stated the defendant on May 17, 1939, filed in the circuit court her demand for a jury trial. This amounted to a general appearance, and she did not make the motion to dismiss until the case was thereafter called for trial on June 28, 1939. By appearing generally in the circuit court the defendant waived the question of the jurisdiction of the circuit court on appeal. (Chicago Paint and Wallpaper Company v. Mollahan, 67 Ill. App. 601; Davison v. Heinrich, 340 Ill. 349.)

Upon the finding of the trial court that it was not the intention of the parties to the contract that the plaintiff should be entitled to a profit on the sale of the property, the court held that the plaintiff was not entitled to recover the amount of the agreed commission. This conclusion is without error. The agreed fund was to be paid over to the plaintiff upon the sale of the property and the fund was to be used for the purpose of paying the commission and the fees which the defendant had expended in the attempt to sell the property. Since the sale never took place, the plaintiff was not entitled to the commission.

The evidence fully supports the finding of the trial court that the agreed fund for expenses was all that payment for the agreed commission, and the expenses of the fund by the defendant was a reasonable fulfillment of the contract (Ehrlich v. Adams, 20 Ill. App. 2d 111; Sandell v. Schwartz, 319 Ill. App. 2d 1; Greenberg v. Stark, 348 Ill. App. 447.)

The fact that an agreement was in the use proved on a contract may be shown by evidence other than the writing on the particular transaction. (Lawrence v. Dailey, 280 Ill. 2d; Early Leasing v. Fielding, 319 Ill. App. 2d.)

However, as stated the defendant on May 17, 1960, filed in the counsel court that denied the a jury trial. This contention is a general appearance, and she did not make the motion in Illinois until she made the interpleader motion for trial on June 20, 1960. If appearing generally in the circuit court the defendant waived the jurisdiction of the plaintiff on the circuit court on appeal. (Gibson Tabor and Ballingrud Company v. Robinson, 27 Ill. App. 2d; Hurly Service v. Kimmel, 340 Ill. App.)

Defendant complains of certain alleged errors in the admission of evidence and questions the sufficiency of the proof to sustain the trial court's judgment. No report of proceedings of the trial appears in the record, and in the absence of such report such errors, if any, are not before this court for consideration.

Judgment affirmed.

Abstract

Abstract

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1939.

Term No. _____ Agenda No. _____

| | |
|---|---|
| Francis J. Skye, Plaintiff-Appellee, | Appeal from the City Court of East St. Louis, Illinois. |
| VS. | |
| Francis J. Skye Distributing Company, a corporation, Defendant-Appellant. | Hon. Wesley E. Lueders, Judge Presiding. |

Dady, J.

305 I.A. 159

Defendant, Francis J. Skye Distributing Company, an Illinois corporation, brings this appeal from a judgment of the city court of East St. Louis in favor of plaintiff Francis J. Skye.

Plaintiff's complaint charged that defendant owed plaintiff $1,279.00 on several different claims. Defendant filed an answer denying any indebtedness, and a counter-claim in the sum of $1,042.26. No question of pleadings is raised.

The case was tried without a jury. The trial court entered judgment in favor of plaintiff in the sum of $820.10, and entered judgment against the defendant on its counter-claim.

Of the items going to make up said sum of $820.10, only two are disputed by the defendant, namely, an allowance for $500 for personal services of plaintiff and an item in the sum of $57.10 hereinafter referred to.

On June 6, 1938, plaintiff and his wife, Marion Skye, as parties of first part, and Louis E. Levy, agent, as party of second part, and Francis J. Skye Distributing Company, a corporation, as party of third part, entered into a written contract, which recited that the first parties owned, controlled and operated a certain liquor business; that third party had recently been

Defendant, Brunde J. Skye Distributing Company, an Illinois corporation, brings this appeal from a judgment of the circuit court of Macel St. Louis in favor of plaintiff Francis J. Tyre.

PLAINTIFF'S complaint stated that defendant had violated Ill.Rev.Stat. 81,[illegible] in several different claims. Defendant filed an counter-claim, alleging any indebtedness, and a counter-claim in the sum of $1,040.54. No question of jurisdiction is raised.

The case was tried without a jury. The trial court entered judgment in favor of plaintiff in the sum of $[illegible].10, and entered judgment against the defendant on his counter-claim.

Of the items going to make up said sum of $[illegible].10, only two are disputed by the defendant, namely, an allowance for 1000 for personal services of plaintiff and an item in the sum of $27.17 "entertainer expense".

On June 8, 1959, plaintiff and his wife, Lorna Tyre, as parties of first part, and Louis E. Levy, agent, as party of second part, and Brunde J. Skye Distributing Company, a corporation, as party of third part, entered into a written contract, which recited that the first parties owned, controlled and operated a certain liquor business; that the third party had recently been

organized as a corporation to engage in the liquor distributing business; that it was the intent of parties of first part to sell, transfer and assign to said corporation all of the good will, merchandise and other assets then owned by first parties; that first parties contemplated owning and desired to sell all of the capital stock in said corporation to second party or his nominees, and second party desired to purchase such stock on terms therein set forth. So far as material, said contract then stated that, in consideration of one dollar and the mutual covenants, the parties agreed, among other things, in substance as follows: First parties agreed to execute bills of sale to said corporation covering the assets then owned by first parties, describing the same, at prices fixed in said contract, the same to be paid for on or before June 15, 1938; that first parties agreed to sell and second party agreed to buy all of such capital stock at a certain price; that first parties agreed to devote all of their time and energy promoting the good will of said corporation until July 15, 1938, for a reasonable compensation; that first parties agreed to submit to said corporation, at the time of sale and transfer, duly executed resignations as officers and directors of such corporation, effective July 15, 1938, or at such earlier date as might be determined by second party; and that said corporation agreed to promptly account for and pay over to first parties all moneys received by said corporation in connection with the accounts receivable of first parties, determined as of close of business on May 31, 1938, which accounts receivable were to remain the property of first parties.

It appears that on or prior to July 15, 1938, the contract was consummated.

On January 1, 1939, Marion Skye assigned to the plaintiff all of her interest in the contract.

organized as a corporation to operate in the liquor distributing business; that it was the intent of parties of first part to sell, transfer and assign to said corporation all of the good will, merchandise and other assets then owned by first parties; that first parties contemplated owning and desired to sell all of the capital stock in said corporation to second party or his nominee, and second party desired to purchase such stock or have himself or first party, his few in material, write insert their initial that, in consideration of mutual dollar and the valid covenants, conditions agreed, among other things, in substance as follows: first parties agreed to execute bills of sale to said corporation covering the assets then owned by first parties, including the type, at prices fixed in said contract, the same to be paid for on or before June 15, 1938; that first parties agreed to sell and second party agreed to buy all of such capital stock at a certain price; that first parties agreed to devote all of their time and energy promoting the good will of said corporation until July 15, 1939, for a reasonable compensation; that first parties agreed to submit to said corporation, at the time of sale and transfer, duly executed resignations as officers and directors of such corporation, effective July 15, 1938, or at such earlier date as might be determined by second party; and that said corporation agreed to promptly account for and pay over to first parties all moneys received by said corporation in connection with the accounts receivable of first parties, determined as of close of business on May 31, 1938, which accounts receivable were to remain the property of first parties.

It appears that on or prior to July 15, 1938, the contracts were terminated.

On January 1, 1939, Marion Cuyz assigned to the plaintiff all of her interest in the contract.

Plaintiff testified that from the date of the execution of said contract until July 15, 1938, he remained with and managed the business of the corporation, working "day and night, regularly and steadily," "breaking" new men into the business, lining up salesmen and selling merchandise in the place of business of defendant and on the road, and that a reasonable compensation for such services would be $125 per week. From the record we believe the court was justified in believing his testimony and that $500 was a reasonable allowance for such services of the plaintiff.

Defendant next contends that said contract was illegal for the reason that compensation was voted to officers of a corporation by resolution carried by a vote of the officers to be compensated, - plaintiff being the president, and plaintiff and his wife and one other person being the sole directors of said corporation at the time said contract was entered into. Inasmuch as defendant accepted the benefit of services of the plaintiff, which were outside of his duties as president of defendant, the defendant is liable for reasonable compensation for such services regardless of the contract. (Bloom v. Vehon Company, 341 Ill. 200; Voorhees v. Mason, 245 Ill. 256.)

As to the disputed item of $57.10,- plaintiff testified that on June 13, 1938, and after the corporation, pursuant to said contract, took possession of the stock of goods theretofore owned by plaintiff and his wife, $65.00 worth of such merchandise was stolen and that on July 1, 1939, when plaintiff and defendant settled or partially settled their accounts the defendant withheld $65.00 from plaintiff, and that Mr. Alpern, the succeeding president of the defendant, at that time told plaintiff he would be paid therefor when the insurance on such stolen merchandise was collected.

Alpern as a witness for defendant testified he knew of the stolen liquor, that "if I owe Mr. Skye anything, I owe him $57.10 not $65.00," and that no adjustment had been made with the insurance company on the stolen liquor. Plaintiff's right to recover was not dependent on the collection of such insurance, and the court was justified in allowing such item.

Defendant's next contention is that the court erred in not allowing its counter-claim, which if allowed would have more than offset the claim allowed plaintiff. This counter-claim is based entirely on the charge that one Grigsby, who was a salesman for plaintiff and his wife before and at the time of the organization of the corporation, and who thereafter continued as such salesman for the defendant corporation, collected between June 1, 1938, and July 15, 1938, moneys from the sale of merchandise belonging to defendant and, without the consent of defendant but at the direction of plaintiff, turned such moneys over to plaintiff to apply in payment of accounts due plaintiff and his wife, prior to June 1, 1938, from the same customers. We do not feel required to go into any lengthy discussion of the evidence on this issue, but consider it sufficient to say that the record does not show that any money collected by Grigsby on the sale of merchandise belonging to defendant was actually used in payment of plaintiff's accounts receivable.

Defendant complains of the refusal of the court to admit in evidence a certain exhibit. This exhibit is not abstracted, hence defendant is in no position to raise the question. (Rehfus v. Hill, 243 Ill. 140.)

The judgment of the trial court is affirmed.

Affirmed.

Abstract

figure as a witness for defendant testified in lieu of the stolen liquor, when "if I can do, Guy Augustus, I can give [sic.] no [illegible]." and that no adjustment had been made with the insurance company on the stolen liquor. Plaintiff's right to recover was not dependent on the validity of such insurance, and the court was justified in striking such item.

Defendant's most serious objection is that he must pay twice in that striking his counter-claim, which if allowed would have been the offset the claim allowed plaintiff. This counter-claim is based entirely on the charge that the "Origo", who was a salesman for plaintiff and his wife before and at the time of the organization of the corporation, and the Commercial Bankers Association, entered into a conspiracy, entitled express June 1, 1926, and July 15, 1926, whereby from the sale of nonpurchasing intoxicating to refreshment and, without the knowledge of the directors of the corporation, but at the direction of plaintiff, forced such money over to plaintiff to apply in payment of accounts due wholesale and retail wine, which to June 1, 1926, from the same customers. We do not feel required to go into any lengthy discussion of the evidence on this issue, but consider it sufficient to say that the record does not show that any money collected by reason of the sale of nonpurchasing intoxicating refreshment was actually used in payment of plaintiff's accounts receivable.

Defendant complains of the refusal of the court to admit in evidence a certain exhibit. This exhibit is not abstracted; hence defendant is in no position to raise the question. (Dahling v. Hill, 165 Ill. App.)

The judgment of the trial court is affirmed.

Affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Abstract

October Term, A. D. 1939

Term No. _____ Agenda No. _____

| | |
|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error | Writ of Error to the County Court of Clinton County, Illinois, No. 9 |
| VS. | |
| TED HOLZHAUER and MARY WEATHERLY, Plaintiffs in Error | Hon. William Ragen Presiding Judge. |

305 I.A. 160

DADY, J.

On February 23, 1939, the State's Attorney of Clinton County filed in the county court of that county an information charging that the defendants, Ted Holzhauer and Mary Weatherly, on January 4, 1939, in said county "unlawfully * * * did live in an open state of adultery and fornication, not being married to each other, but Ted Holzhauer was then and there a married man and not legally divorced from his wife; and that Mary Weatherly was then and there a married woman and not legally divorced from her husband," contrary * * * etc.

A jury found both defendants guilty "in manner and form as charged."

Motions for a new trial and in arrest of judgment made by each defendant were overruled, and the trial court entered a judgment of guilty as to each defendant, to review which defendants have sued out a writ of error.

Defendants contend that the information is defective in substance in that it fails to state that defendants lived "together"

or with whom either defendant was living. The record does not show that any motion was made to quash the information. The motion in arrest of judgment merely states that the complaint "does not state an offense against the penal laws." In our opinion, although informal, the information sufficiently charges defendants with a violation of the Statute in question. (Crane v. People, 168 Ill. 395; People v. Love, 310 Ill. ~~567~~ 558.)

Inasmuch as the information specifically charges that each of the defendants was married at the time of the commission of the alleged offense to a person other than the co-defendant, the information in effect charged each defendant with living in an open state of adultery,- and not in a state of fornication, and this is true although the word "fornication" was used. In order to convict either defendant of living in an open state of adultery it was necessary for the state to prove that such defendant at the time of the commission of the alleged offense was a married person and had a spouse living. (Lyman v. People, 198 Ill. 544; Miner v. People, 58 Ill. 59.)

The defendants contend that there is no evidence tending to show that either one of them was at the time of the commission of the alleged offense married to some person other than the co-defendant.

The case is presented to us on a stipulation of facts signed by the State's Attorney in behalf of the People, and by the defendants, by their attorney, which stipulation was approved

or with whom either defendant was living. The record does not show that any motion was made to quash the information. The motion in arrest of judgment merely states that the complaint "does not state an offense against the penal laws." In our opinion, although informal, the information sufficiently charges defendants with a violation of the statute in question. (Dunne v. People, 168 Ill. 385; People v. Berg, 250 Ill. 158.)

Inasmuch as the information specifically charges that each of the defendants was married at the time of the commission of the alleged offense to a person other than the co-defendant, the indictment in effect charges each defendant with living in an open state of adultery, - and not in a state of fornication, and this is true although the word "fornication" was used. In order to convict either defendant of living in an open state of adultery it was necessary for the state to prove that such defendant at the time of the commission of the alleged offense was a married person and had a spouse living. (Dunne v. People, 168 Ill. 385; Moore v. People, 83 Ill. 89.)

The defendants contend that there is no evidence tending to show that either one of them was at the time of the commission of the alleged offense married to some person other than his co-defendant.

The case is presented to us on a stipulation of facts signed by the State's Attorney in behalf of the People, and by the defendants, by their attorney, which stipulation was approved

by the trial judge and filed in the trial court. This stipulation states that no reporter was present at the trial and that there was no stenographic report of the evidence. It states that such stipulation is a "true and correct record and transcript of the proceedings had," and then states what evidence was adduced and concludes with the statement that "all facts not incorporated in the transcript" were waived. We have carefully read such stipulation or "transcript" and in our opinion it does not appear from such stipulation that any evidence whatever was introduced which showed or tended to show that either defendant was married and had a spouse living at any time prior to the filing of the information and within the period covered by the statute of limitations.

In his printed brief the State's Attorney states what he claims certain witnesses testified to on the trial, but such alleged testimony does not appear in the stipulation or in the abstract or record, - and hence cannot be considered by us. We can only consider the record as presented.

The cause is reversed and remanded.

Reversed and remanded.

Abstract

by the trial judge and filed in the trial court. This stipulation states that no reporter was present at the trial and that there was no stenographic record of the evidence. It states that such stipulation is a "true and correct record and transcript of the proceedings had," and that counsel stipulated and agreed that conclude with the statement that "all facts not incorporated in the transcript" were waived. We have carefully read such stipulation or "transcript" and in our opinion it does not appear from that stipulation that any evidence was introduced which showed or tended to show that either defendant was married and had a regular living at any time prior to the filing of the information and that the jurisdiction of the trial court is [illegible].

In his petition that the court's Attorney states that he claims certain witnesses testified to at the trial, but such alleged testimony does not appear in the stipulation or in the abstract or record, - and hence cannot be considered by us. We can only consider the record in [illegible].

The cause is reversed and remanded.

Reversed and remanded.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On APR 6 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

merchandise and fixtures. Upon two of these policies aggregating $9,000.00 appellee brought suit and recovered a judgment for $9,259.95, which was sustained by this court. Sundquist v. Hardware Mutual Fire Ins. Co., 296 Ill. App. 510. Thereafter the judgment of this court was affirmed by the Supreme Court. Sundquist v. The Hardware Mutual Fire Ins. Co., 371 Ill. 360.

The facts with reference to the origin of the fire and the financial condition of appellee sufficiently appear in these opinions of the Supreme Court and of this court and need not be repeated. Upon the trial of the instant case the defendant contended, as did the defendants in the former case, that the fire was of incendiary origin and there was evidence tending to establish that defense. In his opening argument to the jury one of appellee's attorneys referred to the fact that one of the defenses interposed by the defendant was arson, which counsel asserted must, under the law, be proven by the defendant beyond all reasonable doubt. Counsel for appellant objected and the court overruled the objection and counsel for the plaintiff then said: "They must prove beyond all reasonable doubt, as I told you in the beginning, what they had to do". In his concluding argument to the jury, another of plaintiff's counsel in commenting upon the defense that the fire was of incendiary origin, said: "That is the way it looks to me. People are presumed to be honest and righteous unless the contrary is shown. Therefore the law places upon these men the burden, if this man has committed a crime which excuses them from meeting the provisions of this contract, then they must come here with evidence that shows him guilty of the crime of arson beyond all reasonable doubt".

merchandise and fixtures. When one of these policies aggregating $4,000.00 appellee brought suit and recovered a judgment for $9,559.95, which was sustained by this court. (Rodriguez v. Hardware Mutual Fire Ins. Co., 206 Ill. App. 531. Afterwards the judgment of this court was affirmed by the Supreme Court. Rodriguez v. The Hardware Mutual Fire Ins. Co., 279 Ill. 140.

The facts with reference to the origin of the fire and the financial condition of appellee sufficiently appear in those opinions of the Supreme Court and of this court and need not be repeated. Upon the trial of the instant case the defendant contended, as did the defendant in the former case, that the fire was of incendiary origin and there was evidence tending to establish that defense. In his opening argument to the jury one of appellee's attorneys referred to the fact that one of the defenses interposed by the defendant was arson, which crime must necessarily, under the law, be proved by the defendant beyond all reasonable doubt. Counsel for the defendant objected and the court overruled the objection and counsel for the plaintiff then said: "They must prove beyond all reasonable doubt, as I told you in the beginning, that they had to do." In his concluding argument to the jury, another of plaintiff's counsel in commenting upon the defense that the fire was of incendiary origin, said: "That is the way it looks to me. People are presumed to be honest and righteous unless the contrary is shown. Therefore the law placed upon those men the burden, if this man has committed a crime which prevents him from reaping the provisions of this contract, then they must come here with evidence that shows him guilty of the crime of arson beyond all reasonable doubt."

Counsel for defendant again objected. The court overruled the objection and counsel for plaintiff then continued: "We contend that is the law and the court sustains our contention this far in the argument at least". In this connection counsel for defendant tendered to the court the following instruction which was refused. "The Court further instructs the jury that if you believe from a preponderance or greater weight of the evidence that the plaintiff, with intent to cheat and defraud the defendant, wilfully and maliciously set fire to or cause to be set fire to or burned or caused to be burned, the property described in the policy of insurance sued on, then your verdict should be for the defendant".

This refused instruction is in the identical language of the refused instruction set forth in the opinion of the Supreme Court in Sundquist v. Hardware Mutual Ins. Co., supra, at page 363. That case overruled Rost v. Noble and Co., 316 Ill. 357 and the cases therein cited, the court stating that the reasonable doubt rule which required proof of the commission of a felony beyond a reasonable doubt, either as a cause of action or a defense in a civil suit would no longer be adhered to in this state and expressly held that this instruction should have been given. The court concluded, however, that the refusal to give this instruction did not require a reversal of that judgment inasmuch as the record disclosed that no instruction was given saying anything about reasonable doubt but did disclose that an instruction was given which required a finding for the defendants if it was shown by a preponderance of the evidence

Counsel for defendant again objected. The court overruled the objection and counsel for plaintiff then continued: "The contract is the law and the court construes our contention this far in the response at issue". In this connection counsel for defendant turned to the court the following instruction which was refused. "The jury further instructs you that if you believe from a preponderance of the evidence weight of the evidence that the plaintiff, who failed to cover and exercised due diligence, efficiently and satisfactorily, and fire in no cover to be sold five to be covered or caused to be insured, the property described in the policy of insurance sued on, then your verdict should be for the defendant".

This refused instruction is in the identical language of the refused instruction set forth in the opinion of the Supreme Court in Insurance v. Hardware Mutual Ins. Co., supra, at page 383. That case overruled Ruck v. Valley Mut. Co., 38 Ill. 157 and the cases therein cited, the court holding that the recognized rule which required proof of the commission of a felony beyond a reasonable doubt, either as a cause of action or a defense in a civil suit could no longer be adhered to in this state and approved, and that the instruction should have been given. The court concluded, however, that its refusal to give this instruction did not involve a reversal of the judgment inasmuch as the record disclosed that no instruction was given which directly or indirectly or by implication stated or implied that the defendant was guilty of a felony. It was that an instruction was given which required a finding for the defendants if it was shown by a preponderance of the evidence

that the plaintiff had falsely sworn that he was ignorant of the origin of the fire. The record in that case also disclosed that a special interrogatory had been submitted to the jury which specifically found that the plaintiff did not swear falsely when he said the casue of the fire was unknown to him. It likewise appears from the record in the instant case that appellee did not request nor did the court give any written instruction requiring proof of anything beyond a reasonable doubt and the ninth given instruction in the instant case is identical with the tenth given instruction as appears on pages 365 and 366 of the opinion of the Supreme Court in the former Sundquist case. However, no special interrogatories were submitted to the jury in the instant case. The record here then differs from the record in the former case in two particulars, first the absence of a special finding to the effect that the plaintiff did not swear falsely when he said the cause of the fire was unknown to him and second the erroneous statement of the law made in counsel's argument to the jury which the trial court sanctioned. The record discloses that appellee only requested one instruction which was to the effect that if the jury found the issues for the plaintiff that interest should also be allowed. Appellant tendered twenty-two instructions, fifteen of which were given as offered, one modified and six refused. In none of them werethe jury told that they should be governed by the law as found in the instructions. The statement of the applicable law enunciated by counsel for appellee in their argument was erroneous. The trial court should have sustained an objection thereto. The only conclusion the jury would have been warranted in arriving at after

that the plaintiff had falsely sworn that he was ignorant of the origin of the fire. The record in that case also disclosed that a special interrogatory had been propounded to the jury which specifically found that the plaintiff did not cause the fire when he said the cause of the fire was unknown to him. In otherwise reports from the records of the Supreme Court that contains did not result in the court giving any kind of instruction requiring proof of something beyond a mere conflict in testimony which gives instruction to the jurors and counsel in the trial, even instructions as appears on page 10 of the opinion of the Supreme Court in the Tucson case, but, however, no special interrogatories were propounded to the jury in the instant case. The record does disclose that the record in the Tucson case in the instant case, that the absence of a special finding on the defense that specifically did not answer fraudulently on the origin of the fire was followed so his and treated the evidence adduced at the hearing in counsel's argument to the jury which was also treated accordingly. The record discloses that questions only recorded and inserted in which was to the effect that if the jury found the insured for the plaintiff that interest might also be allowed. Evidence introduced twenty-two instructions, fifteen of which were given as offered, one modified and six refused. In none of them would the jury told that they should be governed by the law as found in the instructions. The arguments of the principle law enunciated by counsel for appellee in their argument was erroneous. The trial court should have restricted an objection if made. The only conclusion the jury could have been responded in arriving at after

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the court had overruled counsel's objection was that defendant must prove this particular defense not by a preponderance of the evidence but beyond a reasonable doubt. Under the holding of the Supreme Court the refusal of the tendered instruction under the facts as disclosed by this record necessitates a reversal of this judgment.

It is also insisted by counsel for appellant that the record discloses appellee to have been guilty of such fraud and false swearing after the loss as to render the policy sued on void under the provisions of the policy and it is insisted that the record is entirely different in this respect from the record in the former case. It is also insisted that the verdict of the jury on the issue of the extent of the loss is against the weight of the evidence. Inasmuch as this case must be submitted to another jury it is not necessary for us to consider these alleged grounds for reversal and we refrain from expressing our opinion as to the weight of the evidence upon these issues. Neither is it necessary for us to pass upon the alleged improper remarks made by counsel for appellee in the presence of the jury during the progress of the trial or the refusal of the trial court to sustain appellant's challenge to the array of petit jurors.

It is also insisted that the trial court erred in permitting Theodore Sundquist, a son of appellee, to testify that in his opinion the actual cash value of the merchandise in appellee's store on May 1, 1936 was between sixteen and twenty thousand dollars. His testimony disclosed that he was working in the Galva store and assisted his father in making up the inventories of that date which were offered and admitted in evidence. His testimony further disclosed that at the time of the hearing he was employed, and had been for a year and a half, by Sears, Roebuck

the court had overruled counsel's objection and that appellant must prove this particular defense not by a preponderance of the evidence but beyond a reasonable doubt. Under the holding of the Supreme Court the refusal of this tendered instruction under the facts as disclosed by this record necessitates a reversal of this judgment.

It is also insisted by counsel for appellant that the record discloses evidence to the effect that there was fraud and false swearing after the loss on the part of appellee, which rendered void under the provisions of the policy and it is insisted that the record is materially different in this respect than the record in the former case. It is also insisted that the verdict of the jury on the issue of the amount of the loss is against the weight of the evidence. Inasmuch as this case must be submitted to another jury it is not necessary for us to consider these alleged grounds for reversal and we refrain from expressing our opinion as to the weight of the evidence upon these issues. Neither is it necessary for us to pass upon the alleged improper remarks made by counsel for appellee in the presence of the jury during the progress of the trial or the refusal of the trial court to sustain appellant's challenge to the array of petit jurors.

It is also insisted that the trial court erred in permitting [illegible] [illegible], a son of appellee, to testify that in his opinion the actual cash value of the merchandise in appellee's store on May 1, 1930 was between sixteen and twenty thousand dollars. His testimony disclosed that he was working in the store and assisted his father in making up the inventories of that date which were offered and admitted in evidence. His testimony further disclosed that at the time of the hearing he was employed, and had been for a year and a half, by Sears, Roebuck

and Company in Chicago in the office of the Merchandise Superintendent of that company and that his daily work had to do with watching the prices and price changes of furniture, rugs and all lines of merchandise. He testified that before going to Chicago he worked as a salesman in the Galva store for his father about three years, was familiar with the stock, had handled most of it, knew the wholesale and retail values thereof and had called off the various items of merchandise to his father at the time his father listed it in the inventories referred to. He was cross-examined at length by counsel for appellant and gave his opinion of the value of certain items inquired about and was unable to do so as to others. In our opinion his testimony was competent and the weight to be accorded it was a matter exclusively for the jury. The trial court refused to admit in evidence a certified copy of the bankruptcy proceedings and appraisers' report which disclosed the purchase of the Emery stock by Sundquist in 1922. In view of the condition of the record at the time this offer was made, we are inclined to think it was admissible. The other error complained of occurred while J. W. Sundquist, a brother of appellee, was on the witness stand. He testified that a piano frame found in the debris after the fire was a "Vose" piano. The plaintiff from his seat at counsel's table in an audible voice said: "Schiller piano". Counsel for appellant moved the court to direct the reporter to insert in the record this occurrence which was done, the court stating: "All right. The Court will allow that, as the court heard it himself". Nothing further appears in the record. Of course it was improper for appellee to have made this statement. The court did everything which counsel for appellant requested. All of it occurred in the presence of the jury and will not occur again.

and Company in Chicago in the office of the Merchandise Superintendent of that company and there his daily work had to do with watching the prices and price changes of furniture, rugs and all lines of merchandise. He testified that before going to Chicago he worked as a salesman in the dry goods store for his father about three years, was familiar with the house, and [illegible] some of it, from the basement [illegible] which, [illegible] and had called off the various lines of merchandise by his father at the time his father listed it in the inventory referred to. He was cross-examined at length by counsel for appellee and gave his opinion of the value of [illegible] [illegible] and was unable to do so in [illegible]. In our opinion his testimony was competent and the weight of it [illegible] was a matter exclusively for the jury. The trial court refused to admit in evidence a certified copy of the [illegible] [illegible] value disclosed the purchase of the [illegible] by [illegible] in 1922. In view of the [illegible] of the record in the [illegible] this offer was made, we are inclined to think it was admissible. The other error complained of concerns remarks [illegible] [illegible], counsel of appellee, made in the closing argument. He admitted that a [illegible] found in the [illegible] [illegible] the [illegible] [illegible]. The plaintiff [illegible] his [illegible] of [illegible] [illegible] [illegible]: "[illegible]." Counsel for appellant moved the court to direct the reporter to insert in the record this occurrence which was done, the court [illegible] [illegible]. The [illegible] will allow that, or the court [illegible] it [illegible]. Nothing further appears in the record. Of course it was improper for appellee to have made this statement. The court did everything which counsel for appellant requested. All of it occurred in the presence of the jury and will not occur again.

For the reasons indicated, the judgment appealed from will be reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9477 AGENDA NO. 2

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| IN RE: THE CONSERVATORSHIP OF HERMAN R. HIRE, an incompetent person, BESSIE L. HIRE, Conservatrix, etc., Appellee, vs. FIRST NATIONAL BANK OF PEORIA, Appellant. | APPEAL FROM CIRCUIT COURT HENRY COUNTY. |

HUFFMAN - J.

This is a proceeding brought by appellee to reclaim a certificate for 50 shares of stock from appellant. The action was brought under Sec. 7 of the Uniform Stock Transfer act (ch. 32, sec. 416, Ill. St. 1939).

The certificate of stock was endorsed in blank by Mr. Hire. He placed it with Rogers & Company, brokers located in the city of Peoria, Thereafter, Rogers & Company pledged the stock with appellant as security on a loan. This loan was paid and the stock again came into the possession of Rogers & Company. It was thus pledged by Rogers & Company with appellant several times, and each time redeemed by payment of the loan, until March 23, 1938, when the stock was again pledged by the brokers to appellant for $1250. It has not been redeemed from that loan.

Following the appointment of the conservatrix for Mr. Hire, a letter was written to appellant bank by the attorneys for the

MEMORANDUM - 1.

This is a proceeding brought by appellee to replain a certificate for 50 shares of stock from appellant. The action was brought under Sec. 7 of the Uniform Stock Transfer Act (ch. 32, sec. 416, Ill. Rev. 1939).

The certificate of stock was endorsed in blank by Mr. Mire. He placed it with Rogers & Company, brokers located in the city of Peoria. Thereafter, Rogers & Company pledged the stock with appellant as security on a loan. This loan was paid and the stock which was held the possession of Rogers & Company. It was thus pledged by Rogers & Company with appellant several times, but each time redeemed by payment of the loan, until March 23, 1939, when the stock was again pledged by the brokers to appellant for $1250. It has not been redeemed from that loan.

Following the appointment of the conservatrix for Mr. Mire, a letter was written in appellant bank by the attorneys for the

conservatrix, advising the bank of such appointment, and requesting information regarding any accounts or property of Mr. Hire that might be in its possession. This letter was written under date of November 20, 1937. Two days later, appellant by letter, advised the attorneys for the conservatrix that it had no accounts of Mr. Hire's on its books.

When it was discovered by appellee that the certificate of stock was in appellant's possession as security for a loan to the brokers, this petition was filed in the county court for citation to cause appellant to appear with respect to recovery of the property in question. (ch. 86, sec. 54, Ill. St. 1939). The county court dismissed the petition and discharged appellants. The conservatrix appealed to the circuit court, where the question was resolved in favor of appellant by jury. Following return of the verdict, appellee filed motion for a new trial, which motion was granted, and appellant brings this appeal from the order of the circuit court granting the motion for a new trial.

While the trial court might well have denied the motion for a new trial, yet the case contained questions of fact as well as law, and a trial court has a wide discretion in this regard. He has the advantage over this court, as he hears the witnesses testify, and for this reason, we are reluctant to change the order of the court with respect to the granting of the motion for a new trial.

The letter written by appellee to appellant advising it of the conservatorship of Mr. Hire's estate, was written under date of November 20, 1937, which was but four days following the appointment. The stock was placed by Mr. Hire with

conservatrix, advising the bank of such appointment, and requesting information regarding any accounts or property of Mr. Hire that might be in its possession. This letter was written under date of November 20, 1927. Two days later, appellant by letter, advised the attorneys for the conservatrix that it had no accounts of Mr. Hire's on its books.

When it was discovered by appellee that the certificate of stock was in appellant's possession as security for a loan to the broker, this petition was filed in the county court for citation to cause appellant to appear with respect to recovery of the property in question. (Ch. 86, sec. 54, Ill. St. 1929). The county court dismissed the petition and discharged appellants. The conservatrix appealed to the circuit court, where the question was resolved in favor of appellant by jury. Following return of the verdict, appellee filed motion for a new trial, which motion was granted, and appellant prays this appeal from the order of the circuit court granting the motion for a new trial.

While the trial court might well have denied the motion for a new trial, yet the case contained questions of fact as well as law, and a trial court has a wide discretion in this regard. He has the advantage over this court, as he hears the witnesses testify, and for this reason, we are reluctant to change the order of the court with respect to the granting of the motion for a new trial.

The letter written by appellee to appellant advising it of the conservatorship of Mr. Hire's estate, was written under date of November 20, 1927, which was but four days following the appointment. The stock was placed by Mr. Hire with

the broker on October 6, 1937, and on that date the broker pledged the stock with appellant as security for a loan. This loan was shortly paid, and the stock again pledged on October 9, 1937. This loan was paid on November 29, 1937, and the stock again pledged on March 4, 1938. This loan was paid on March 14, 1938. The stock was pledged for the last time on March 23, 1938. It is the position of appellee that by virtue of the above section of the Uniform Stock Transfer act, she has the right to reclaim the same from appellant.

Under the evidence in the case, we hesitate to reverse the order of the trial court in granting the motion. Where questions of fact exist, an order granting a motion for a new trial will not be disturbed, unless it appears there was an abuse of discretion in granting such motion. Carter v. Geeseman, 303 Ill. App. 281, 285.

The order granting the motion for new trial is therefore affirmed.

Order affirmed.

the street on October 6, 1937, and on that date the trustee pledged the stock with appellant as security for a loan. This loan was shortly paid, and the stock again pledged on October 9, 1937. This loan was paid on November 29, 1937, and the stock again pledged on March 1, 1938. This loan was paid on March 14, 1938. The stock was pledged for the last time on March 23, 1938. It is the position of appellee that by virtue of the above section of the Uniform Stock Transfer Act, she has the right to recover the from appellant.

Under the evidence in the case, we hesitate to reverse the order of the trial court in granting the motion. Where questions of fact exist, an order granting a motion for a new trial will not be disturbed, unless it appears there was an abuse of discretion in granting such motion. Carter v. Swanson, 202 Ill. App. 201, 205.

The order granting the motion for new trial is therefore affirmed.

Order affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On APR the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO.9481 AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| WILLIAM KELTZ, Jr., a Minor, by William Keltz, his next friend,<br>Appellee,<br>vs.<br>FRANK C. NICODEMUS, Jr., as Receiver of the Wabash Railway Company, a Corporation, et al.,<br>Appellants. | |
| ROBERT KELTZ, a minor, by William Keltz, his next friend,<br>Appellee,<br>vs.<br>FRANK C. NICODEMUS, Jr., as Receiver of the Wabash Railway Company, a Corporation, et al.,<br>Appellants. | APPEAL FROM CIRCUIT COURT WILL COUNTY. |
| WILLIAM KELTZ,<br>Appellee,<br>vs.<br>FRANK C. NICODEMUS, Jr. as Receiver of the Wabash Railway Company, a Corporation, et al.<br>Appellants. | |

HUFFMAN - J.

William Keltz, Jr., and Robert Keltz, minors, instituted their suits by their father William Keltz, as next friend, to

recover for personal injuries sustained in a collision between an automobile which they were operating, and one of appellants' trains. The father, William Keltz, brought his suit against appellants to recover for loss of services of his sons and for damages to his automobile, which was involved in the accident. The three cases were consolidated for trial. Verdicts were returned in favor of each of the plaintiffs, and this appeal follows from judgments rendered thereon.

The suits were brought against appellants as receivers of the railway company and John A. Filbert, the engineer of the train involved in the accident. The complaints charged that the defendant receivers, through their servant, defendant Filbert, operated the train in a negligent manner by failing to give any warning of its approach to the crossing in question, as required by statute. The jury returned a verdict in each case, finding the defendant engineer not guilty, which removes from present consideration the question of the negligent operation of the train.

The complaints further charged appellants with failure to install automatic signal devides at the crossing; alleged that the crossing was a hazardous one; that appellants did not have the crossing properly marked with sigh posts to warn persons that it was a railroad crossing; that the planking used at the crossing was not proper and did not comply with the effective orders of the Illinois Commerce Commission; and that the view north along the right-of-way, was obstructed.

The railway track ran north and south. The road being travelled by appellees ran east and west. Appellees were approaching the railroad crossing from the west. About two hundred fifty feet north of the crossing, the tracks of the

remedy for personal injuries suffered in a railroad crossing, as although they were negligent, the use of appropriate brakes. The robber, William Hatch, brought his suit against appellants to recover for loss of services of his wife and for damages to his automobile, which was involved in the accident. The three cases were consolidated for trial. Verdicts were returned in favor of each of the plaintiffs, and this appeal follows from judgments rendered thereon.

The suits were brought against appellants as receivers of the Railway Company and Tom R. Hilbert, the employee of the train involved in the accident. The complaints charged that the defendant receivers, through their servant, Frederick Hilbert, operated the train in a negligent manner by failing to give any warning of its approach to the crossing in question, as required by statute. The jury returned a verdict in each case, finding the defendant employee not guilty, which removes from present consideration the question of the negligent operation of the train.

The complaints further charged appellants with failure to install automatic signal devices at the crossing; alleged that the crossing is a dangerous one; that appellants did not have the crossing properly lighted with electric flare posts; and that it was a public highway, such the plaintiff used at the accident was not proper and did not comply with the effective statute of the Illinois Commerce Commission; and that the view across plaintiff's right-of-way, was obstructed.

The railway track runs north and south. The road being intersected by highways from east and west. Appellees were approaching the railroad crossing from the west. About two hundred fifty feet north of the crossing, the tracks of the

Michigan Central cross over the tracks of appellant, by an overhead crossing, which is referred to in this case as the viaduct. Appellees urge that due to obstructions to the view between the crossing and the viaduct, and due to weeds and vegetation which appellants had permitted to grow up along its right-of-way, their view was so obstructed that they could not see the approaching train.

The question of warning signals, with respect to the crossing itself, is not controlling, as the evidence of appellees disclose that they were familiar with this crossing and upon their approach to it on the day in question, brought the automobile to a full stop about eight feet from the track, and looked in both directions to see if a train was approaching, before proceeding further. The question with respect to the planking upon the crossing, is not a controlling feature, as it had nothing to do with the accident. It appears from the record, that the only question of negligence which could be attributed to the railway company, would be the growth of weeds and vegetation that appellees allege were permitted to grow and accumulate on the west side of the track and to the north of the highway, thus obstructing the view between the crossing and the approach of appellants' train from the north.

Appellees William, Jr., and Robert Keltz, were living with their parents on a farm somewhere in the vicinity of this railwoad crossing. The accident happened on Sunday, July 14, 1935, at about five-thirty in the afternoon. It was a bright, clear day. The two boys left home in their father's car at about two o'clock that afternoon. They met two young ladies with whom they spent the afternoon at various parks and pleasure resorts. Part of the time they were accompanied by Robert

William Dexter, among some the lands of [illegible], by a wooden crossing, which is reported to be in this case on his viaduct. Impatient over that due to construction to the river between the crossing and the village, and due to weeds and vegetation which [illegible] had permitted to grow up along the right-of-way, their view was so obstructed that they could not see the approaching train.

The question of warning signals, with respect to the crossing itself, is not quite clear, as the witness of appellees discloses that they were familiar with this crossing and upon their journey to it on the day in question, because the automobile to a full stop about eight feet from the track, and looked in both directions to see if a train was approaching, before proceeding further. The question with respect to the planting upon the crossing, is not a controlling document, as it had nothing to do with the accident. It appears from the record, that the only question of negligence which could be attributed to the railway company, would be the growth of weeds and vegetation that appellees claim were permitted to grow and accumulate on the west side of the track and to the north of the highway, thus obstructing the view between the crossing and the approach of approaching trains from the north.

Appellees William, Sr., and Robert Leith, were living with their parents on a farm adjacent in the vicinity of this railroad crossing. The accident happened on Sunday, July 14, 1929, at about five-thirty in the afternoon. It was a bright clear day. The sun had fully risen in Saint Thomas's on an about five o'clock that afternoon. They had been young ladies with whom they spent the afternoon at various parts and pleasure resorts. Part of the time they were accompanied by Robert

and Charles Tracy. Toward evening, the party of six left Michigan Beach and appellees took the Tracy boys home, whereupon they started toward their home with the two girls. The road over which they were travelling just prior to the accident, is a rather unimproved country road, rough from ruts and holes. They were approaching the crossing in question from the west. The west end of this country road had been gravelled at one time. The gravel ends shortly to the east of the crossing in question, and from there on, the road is an unimproved dirt road. The photographs show that the travelled portion of this highway is what is commonly called a one track highway. The road is referred to by the witnesses as the Steele Road and is about a mile south of New Lenox.

Robert Keltz received a head injury and does not remember anything about the accident. William, Jr., states that Robert was driving the car at the time and that he was sitting in the front seat to Robert's right. He further states that as they approached this crossing, the car was brought to a full stop about eight feet west of the track; that he and his brother Robert looked north and south to see if there were any trains approaching, and if the way was clear. He states they saw no train approaching, and that his brother started the car forward to cross the track; that when they were about to go upon the west rail, he saw the train for the first time; that it was right in front of them; and that he grabbed the steering wheel and turned the car to the right, which would be to the south and in the direction the train was travelling. The front end of the automobile was struck by some portion of the engine. The car was thrown over in the ditch to the south of the highway and on the west side of the railroad right-of-way.

The evidence shows that the highway is about two feet higher than the ground along the north side thereof. This fact is borne out by the photographs in evidence as introduced by appellees. The photographs do not indicate that the grass and vegetation was such as to obstruct the view of the railroad track or to obstruct the view of approaching trains. William, Jr., states that the car was stopped about fifteen or twenty seconds while he and his brother Robert looked up and down appellants' track to see if a train was approaching. According to his evidence, he never saw the train, nor heard it, until it was right in front of them, and when they were so close to the track that the front end of the car was struck by the train. This was a railroad crossing on a country road, out in the open country. There appears to have been no other traffic on the highway at that time, and no noise or confusion to prevent one from hearing an approaching train. His evidence that the car was brought to a full stop close to the track, is corroborated by his witness Bobbitt, who lives by the crossing. He states that he saw the car pass his house approaching the crossing; that he knew the car and knew the boys; that he had seen them drive along this road and over this crossing at previous times. He states that the car was brought to a full stop before reaching the track; that it was then started forward and was creeping along at about one mile an hour as it approached the track; that he watched the car during the entire time and saw it operated up to the crossing, saw the train coming, and saw the accident. This witness says that the front end of the car collided with the engine, throwing the rear end of the car around to the north and in contact with the baggage coach, whereupon the car was knocked into the ditch on the south side of the highway and on the west side of the track.

The engineer of the train testified that he saw the car approaching the crossing; that the bell was ringing and the whistle was being blown; that upon observing the fact the car did not stop, he had applied the emergency brakes before he reached the crossing. He says that one of the front wheels of the car came in contact with the side of the engine. A number of witnesses testified for appellant that the whistle was sounded at a point north of the overhead crossing of the Michigan Central, and was continued to be sounded until it reached the crossing. There is also evidence of the trainmen that the bell rings by an automatic device and was started ringing and the whistle blown at the whistling post north of the Michigan Central Crossing, and was so continued until after the accident. The jury found that the engineer was not negligent in failing to sound proper warning.

One of the young ladies who was riding with appellees at the time of the accident, states that she was riding in the back seat of the car with Robert Kelta, and that William, Jr., was in the front seat driving the car, with the other young lady at his side.

It is difficult to reconcile the physical facts existing in this case with the exercise of due care and caution on the part of appellees. They were in the operation of an automobile upon a road with which they were familiar; the automobile was brought to a full stop within eight feet of a railroad track, at a highway crossing out in the open country, away from the noise and confusion that prevails in and about switch yards and congested areas of the city; they looked both north and south along the track for approaching trains; the automobile

was then put in gear and driven forward at about one mile per hour, to a point close enough to the west rail of the track to be struck by the engine. Accidents of this nature are indeed regrettable, but sympathy cannot be permitted to replace that degree of care with which every person is chargeable under the law, to observe for his own safety.

One approaching a railroad crossing, should do so with a degree of care commensurate with the known danger. This rule of law is so well established, that the citation of authority is unnecessary. It requires that persons approaching a railroad crossing, must make a reasonable use of their faculties in order to determine the existing conditions, and whether a train is approaching close enough to render their going upon the track dangerous. The application of this rule does not mean that the train must then be across the highway, or immediately upon the highway. Neither will the application of the rule permit one to go recklessly upon the track without taking proper precaution to avoid accident, or to claim that he looked to see if a train was approaching and did not see it, when in fact the train was there, as it is apparent from the evidence in this case this train must have been.

The record has been carefully reviewed. The court does not find evidence going to establish negligence on the part of appellants with respect to the conditions surrounding the crossing in question which appellees claim caused them to be unable to see the approaching train.

The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9519 AGENDA NO. 12

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| W. F. HOLMES, Appellee, vs. W. F. PARTRIDGE, Appellant. | APPEAL FROM CIRCUIT COURT LIVINGSTON COUNTY. |

HUFFMAN - J.

This case comes to this court on appeal from an order of the circuit court of Livingston County denying a motion to vacate a judgment entered by confession in said court. On March 30, 1938, appellee caused judgment by confession to be entered against appellant upon two notes, one of which was dated February 18, 1928, and the other dated February 21, 1928. These notes were signed by four makers, namely, Todd V. Richards, Charlotte E. Richards, J. D. Richards and appellant. At the time the judgment was taken against appellant, Todd V. Richards and J. D. Richards were dead. Appellant filed his motion to vacate the judgment against him on the ground that the warrant of attorney in the notes was joint only, and not joint and several, and that thereby judgment by confession against him could not be had.

The notes were given on a form used by the Farmers State Savings Bank of Cornell, Illinois, and are identical in form.

IN THE APPELLATE COURT OF ILLINOIS,

[illegible] DISTRICT

[illegible], A.D. 1928.

---

[illegible],

Appellee,

vs.

[illegible],

Appellant.

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[illegible] - 7.

This case comes to this court on appeal from an order of the circuit court of Livingston County sustaining a motion to vacate a judgment entered by confession in said court. On March 30, 1926, appellee caused judgment by confession to be entered against appellant upon two notes, one of which was dated February 16, 1924, and the other dated February 21, 1926. These notes were signed by four makers, namely, Todd V. Stevens, Charles E. Stevens, J. D. Stevens and appellant. At the time the judgment was taken against appellant, Todd V. Stevens and J. D. Stevens were dead. Appellant filed his motion to vacate the judgment against him on the ground that the warrant of attorney in the notes was joint only, and not joint and several, and that thereby judgment by confession against him could not be had.

The notes were given on a form used by the Farmers State Savings Bank of Gorrell, Illinois, and are identical in form.

The warrant of attorney therein contained, is as follows: "And in consideration of the above indebtedness and as further security for the same, I hereby irrevocably nominate, appoint and make any attorney at law in the State of Illinois or any other state or territory of the United States, my true and lawful attorney, to appear for me in any court of record in the State of Illinois or in any state or territory of the United States either in term time or in vacation, at any time after the date hereof, and to waive service of process, and to confess a judgment on this note in favor of the payee or any assignee thereof for such sum as shall at such time appear to be unpaid thereon, including attorney's fees as provided for above and herein authorized to be confessed, together with the costs of suit to be taxed;***." No dispute exists with reference to the facts in this case and the only question to be determined is, whether the warrant of attorney is joint, or joint and several. A joint power of attorney does not authorize a judgment against only one of the makers.

A note containing power of attorney very similar to the above was before this court in the case of Duggan v. Kupitz, 301 Ill. App. 230, wherein the power of attorney was held to be joint. The position of this court in that case was supported by the authority there cited. The warrant of attorney under consideration herein, in substance and effect, is the same as the one appearing there; the difference being, that the warrant in this case is more extended in form. The power to confess a judgment must be clearly given and strictly pursued and a departure from the authority conferred will render a confession of judgment void. A warrant of attorney which is joint does not authorize a several judgment, but must be

The warrant of attorney therein contained, is as follows:

"And in consideration of the above indebtedness and as further security for the same, I hereby irrevocably nominate, appoint and make any attorney at law in the State of Illinois or any other state or territory of the United States, my true and lawful attorney, to appear for me in any court of record in the State of Illinois or in any state or territory of the United States either in term time or in vacation, at any time after the date hereof, and to waive service of process, and to confess a judgment on this note in favor of the payee or any assignee thereof for such sum as shall at such time appear to be unpaid thereon, including attorney's fees as provided for above and herein authorized to be entered, together with the costs of suit to be taxed;"". No dispute exists with reference to the facts in this case and the only question to be determined is, whether the warrant of attorney is joint, or joint and several. A joint power of attorney does not authorize a judgment against only one of the makers.

A note containing power of attorney very similar to the above was before this court in the case of Duggan v. Bugins, 301 Ill. App. 230, wherein the power of attorney was held to be joint. The position of this court in that case was supported by the authority there given. The warrant of attorney under consideration herein, in substance and effect, is the same as the one appearing there; the difference being, that the warrant in this case is more extended in form. The power to confess a judgment must be clearly given and strictly pursued and a departure from the authority conferred will render a confession of judgment void. A warrant of attorney which is joint does not authorize a several judgment, but must be

executed by a joint confession against all the signers of the note. Keen v. Bump, 286 Ill. 11, 14.

It is our conclusion that the warrant of attorney contained in the notes in this case is joint, and the joint obligation of the signers of the notes, and that the judgment against appellant by confession is void. The judgment herein is reversed and the cause remanded with directions to vacate the judgment by confession taken against appellant herein.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| MAURICE BARNER, Administrator of the estate of Dessie E. Barner, deceased, and EDNA BARNER, Appellees, vs. NATE COLBY and JOHNSON OIL REFINING COMPANY, a Corporation (Johnson Oil Refining Company, a Corporation, Appellant). | APPEAL FROM CIRCUIT COURT DUPAGE COUNTY. |

HUFFMAN - J.

Appellee administrator brought suit against Nate Colby and the Johnson Oil Refining Company, a corporation, for the alleged wrongful death of Dessie Barner, resulting from a collision of an automobile in which she was riding, with a truck owned and operated by Nate Colby. The defendant, Colby, filed a counterclaim against appellee Edna Barner, who was driving the automobile in which the deceased was riding, and appellee administrator. Thereupon, Edna Barner filed her counterclaim against Colby and appellant company. Trial resulted in verdicts for appellees, whereby the administrator received verdict in the sum of $4000, and counterclaimant Edna Barner, verdict in the sum of $75. Following the usual motions, judgments were entered upon the verdicts. The appellant, Johnson Oil Refining Company, prosecutes this appeal from judgment rendered upon the verdicts as returned against it.

It was charged by the appellees that Colby was operating the motor truck involved in the collision, as the agent and servant of appellant. Appellant and Colby denied such allegation and averred that appellant was not the owner of the truck and that Colby was not the agent and servant of appellant, as charged; and alleged that appellant was not then engaged in the operation of the truck through Colby as its agent or servant, and that it had no control over either Colby or the truck. Therefore, the disposition of this appeal rests upon the question, whether Colby was acting as the agent and servant of appellant.

Appellant is a company engaged in the refining of crude oil, and in the distribution and sale of products common to such industry. In the conduct of its business, it maintains certain storage or bulk station plants about the country, where retail dealers are located who handle its products. The purpose of this being to facilitate distribution to retail dealers. Pursuant to such plan, it maintained a bulk station plant at the city of Pecatonica, in Dupage county.

Colby was at the time in question, acting as the local manager for appellant, under written contract, which was entered into under date of January 10, 1936. By the terms of the contract, Colby agreed to devote his entire time to soliciting sales of refined petroleum products for appellant, at prices to be established by appellant. The sales were to be made in the name of appellant; the merchandise until sold, and the proceeds of such sales, at all times remained the property of appellant. Colby by the terms of the contract, agreed to provide,

maintain and operate at his own expense, such motor trucks as necessary to make proper sale and delivery of appellant's products; that he would pay all taxes on such equipment and license fees thereon, as required by law. Colby's compensation was upon a commission basis, which was set out in detail in the contract, and depended entirely upon the amount of appellant's products he was able to sell. He could not make sales on credit, without the written authority of appellant. He was required to providedpublic liability and property damage insurance upon his motor equipment, at his own expense. Right to terminate the contract was given to either party at any time.

The evidence conclusively shows that the truck was owned by Colby. The contract is substantially the same as that which existed in the case of Jones v. Standerfer, 296 Ill. App. 145, and under that case and the authorities there referred to, it would appear that Colby was an independent contractor, under his agreement with appellant.

The record and authorities referred to in this case, have been carefully examined. While it is true that Colby was engaged in the regular trade and business of appellant in soliciting sales of its products and in the delivery thereof, yet he did so entirely upon his own time and was no way in the control of appellant, except in the manner set out by the contract, and from this instrument it would appear that the will of appellant is dominant only as to the ultimate result to be obtained and not as to the means by which it was to be accomplished. Many authorities may be found bearing upon the question involved herein, but we consider those referred to in Jones v. Standerfer, supra., as sufficiently comprehensive.

materials and operation of his own business, with entire freedom from [illegible] that he could pay all [illegible] on such [illegible] and license [illegible] as required by law. Kelly's responsibility was [illegible] as a contracting party, which was not [illegible] in the case [illegible], and depended entirely upon the amount of [illegible] he was able to haul. He would [illegible] without the written authority of appellant. He was employed by [illegible] liability [illegible] at his own expense. [illegible] the [illegible] of our time.

The evidence conclusively shows that the truck was owned by Kelly. The contract is substantially the same as that which existed in the case of Hance v. Commission, 291 Ill. App. 149, and under that case and the authorities there reviewed in, it would appear that Kelly was an independent contractor, under his agreement with appellant.

The report and authorities referred to in this case, have been carefully examined. While it is true that Kelly was engaged in the regular trade and business of appellant in collecting the milk of the producers and in the delivery thereof, yet he did so entirely upon his own time and was in no way in the control of appellant, except in the manner set out by the contract, and from this agreement it would appear that the will of appellant is dominant only as to the ultimate result to be obtained and not as to the means by which it was to be accomplished. Other authorities may be found bearing upon the question involved herein, but we consider those referred to in Decker v. Commission, supra, as sufficiently distinguishable.

Sometimes appellant's merchandise would be delivered to the bulk plant by rail, and at other times by companies or persons engaged in the trucking business. At the time in question, Colby and a man named Christian had been to appellant's plant at Chicago Heights, where they secured twelve barrels of oil and a quantity of grease and alcohol for motor vehicles. Colby paid Christian for making the trip, and Christian did most of the driving. At appellant's plant, when the bill of lading was completed for the merchandise, appellant's plant superintendent inquired of Colby to whom the truck belonged. Colby replied that it belonged to Christian, and Christian signed the bill of lading for the merchandise. Thus it appears appellant had no knowledge of the fact that its merchandise was being transported to its bulk plant at Pecatonica by Colby's truck.

Appellees have filed their motion to present and introduce certain evidence in this court to which the trial court sustained objections. The appellees have prosecuted no cross appeal and assign no cross errors. Therefore, we do not deem it necessary to consider such motion in the disposition of this appeal.

The judgments herein against appellant are reversed.

Judgments reversed.

Douglas's military aeronautics would be directed to the task which, he felt, had a right claim to preeminence of resources accorded to the overall industry. It is this he specifically felt, and I was most delighted and then to Douglas's plans to change directors, since this required twelve hours of all and a quantity of grease and lubricant for motor vehicles. Only gold industrial for making the body, and the building all sense of the directors. At Douglas's place, when the idea of taking was modified for the aeronautics, Douglas's plans experimental Director of Sales to keep the cases balanced. Only engines that is behoved to initiating and industries almost the idea of taking for the aeronautics. This is a serious problem and no knowledge of the fact that the aeronautics was being transported at the site this plans of Douglas to industry's first.

Douglas have filed their entire to research and future that Douglas patents to this model to which the total model equipment directors. The qualified have presented on cross model and making on cross engines. Therefore, we do not know to accessory to Douglas and engine is the discussion of this model.

The Douglas Davis models qualified was received.

Douglas received.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9531 AGENDA NO. 21.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1940.

| | |
|---|---|
| SADIE YEATES, et al., Appellants, vs. SCHOOL DIRECTORS OF DISTRICT NO. 38, COUNTY OF KANKAKEE AND STATE OF ILLINOIS, Appellees. | APPEAL FROM CIRCUIT COURT KANKAKEE COUNTY. |

HUFFMAN - J.

Appellants as taxpayers of appellee district, brought their complaint to restrain appellee directors from building an additional room to the school house in said district and making certain other new and additional improvements thereto. A temporary writ issued. Upon final hearing, the temporary injunction was dissolved and appellants complaint dismissed. This appeal follows.

Ward Mills, Richard Zimmerman and Cora Nichols were the directors of the district. The school building was an ordinary one room frame building, which had been kept in good repair and was designated as a standard school. On Saturday night, September 10, 1938, a special election was held for the purpose of submitting the question of whether of not a new schoolhouse should be built, and whether or not bonds of the district to the amount of $5000, should be issued therefor. At the conclusion of the election, it was announced

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

September Term, A. D. 1940.

SIXTY FOURTH, et al,

Appellants,

vs. } APPEAL FROM CHAMPAIGN COUNTY COURT

SCHOOL DIRECTORS OF District
NO. 24, COUNTY OF CHAMPAIGN AND
STATE OF ILLINOIS,

Appellees.



Appellants as taxpayers of appellee district, brought their complaint to restrain appellee directors from building an additional room to the school house in said district and making certain other new and additional improvements thereto. A temporary writ issued. Upon final hearing, the temporary injunction was dissolved and appellants complaint dismissed. This appeal follows.

Ward Hills, Richard Zimmerman and Cora Nichols were the directors of the district. The school building was an ordinary one room frame building, which had been kept in good repair and was designated as a standard school. On Saturday night, September 16, 1939, a special meeting was held for the purpose of submitting the question of whether or not a new schoolhouse should be built, and whether or not bonds of the district to the amount of $9000, should be issued therefor. At the meeting of the electors, it was announced

that both propositions had carried, and on the next morning, which was Sunday, directors Mills and Zimmerman employed certain persons to move the schoolhouse off its foundation. On September 14, 1938, the circuit court of Kankakee county issued a restraining order against the directors of the district, restraining them from proceeding with the construction of a new school building and from issuing any bonds therefor, by virtue of the special election. This restraining order is still in force. School has been held in the usual school building.

The complaint in this case was filed on August 9, 1939, to restrain the directors from erecting a new addition of one room to the schoolhouse and from making certain other new improvements thereto, according to a contract which they had entered into at a meeting held on July 17, 1939. Directors Mills and Zimmerman voted for such addition and improvements, and the making of contract therefor.

Director Nichols voted against the proposed addition and improvements to the schoolhouse. She had been a director of that district for thirty-five years. It appears that she voted against the erection of the additional room and the construction of the other proposed improvements, because of the fact that there were only two pupils attending the school, and that neither of them were a resident of the district. One of the students was a niece of director Mills, who had come from Momence to his home and had started to the school. She was about seven years old. During the third week of school, director Zimmerman brought a boy about thirteen years of age, to stay at his house, from another district. All of the children who live in the district are attending school at the city

that both propositions had carried, and on the next morning, which was Sunday, directors Mills and Zimmerman employed certain persons to move the schoolhouse off the foundation. On September 14, 1938, the circuit court of Hawkins county issued a restraining order against the directors of the district, restraining them from proceeding with the construction of a new school building and from issuing any bonds therefor, by virtue of the special election. This restraining order is still in force. School has been held in the usual school building.

The complaint in this case was filed on August 9, 1939, to restrain the directors from erecting a new addition of one room to the schoolhouse and from making certain other new improvements thereto, according to a contract which they had entered into at a meeting held on July 17, 1939. Directors Mills and Zimmerman voted for such addition and improvements, and the making of contract therefor.

Director Nichols voted against the proposed addition and improvements to the schoolhouse. She had been a director of that district for thirty-five years. It appears that she voted against the erection of the additional room and the construction of the other proposed improvements, because of the fact that there were only two pupils attending the school, and that neither of them were a resident of the district. One of the students was a niece of director Mills, who had come from Kentucky to his home and had started to the school. She was about seven years old. During the third week of school, Director Zimmerman brought a boy about thirteen years of age, to stay at his home, from another district. All of the children live in the district and attending school at the city

of Momence.

The testimony of director Zimmerman is to the effect that he has a boy living in his home who has been there about two weeks, and whose parents live in another district; that the boy is thirteen years old; helps on the farm, and attends this school. The testimony of director Mills is to the effect that he thinks the building needs the proposed addition and improvements; that the election for the new school was on Saturday night, and that he moved the building off the foundation at eight o'clock the next morning; that he did not know what arrangements the children in the district had for attending school at Momence; that he did not make any inquiry to find out; that he entered into the contract for the proposed work, not knowing if any children were going to school; that a little girl stays with him and goes to school; that her father lives in Momence; that he has no way of knowing if a family might move into the district with children of school age; and that he owns no land in the district. Cora Nichols testifies that the parents of the children are paying the tuition incident to their attending school in Momence.

It is the position of appellants that appellees, as directors of the school district, had no power to contract for the construction of an additional room to the schoolhouse, without a vote of the people, when such room was not needed for the accommodation of the pupils of the district. In support of this proposition, they refer to the case of Kuykendall v. Hughey, 224 Ill. App. 550. Such was the holding in that case. There is no claim made by appellees that the additional room proposed to be constructed is needed for the accommodation of the students at this school. As a matter of fact, it is apparent such position could not be maintained, as there is no dispute but that

of Monmouth.

The testimony of director Simmons is to the effect that he has a boy living in his home who has been there about two weeks, and whose parents live in another district; that the boy is thirteen years old; helps on the farm, and attends this school. The testimony of director Mills is to the effect that he thinks the building needs the proposed additions and improvements; that the election for the new school was on Saturday night, and that he moved the building off the foundation at eight o'clock the next morning; that he did not know what arrangements the children in the district had for attending school at Monmouth; that he did not make any inquiry to find out; that he entered into the contract for the proposed work, not knowing if any children were going to school; that a little girl stays with him and goes to school; that her father lives in Monmouth; that he has no way of knowing if a family might move into the district with children of school age; and that he owns no land in the district. Dora Nicholls testifies that the parents of the children are paying the tuition incident to their attending school in Monmouth.

It is the position of appellants that appellees, as directors of the school district, had no power to contract for the construction of an additional room to the schoolhouse, without a vote of the people, when such room was not needed for the accommodation of the pupils of the district. In support of this proposition, they refer to the case of Kopendall v. Hughes, 22 Ill. App. 590. Such was the holding in that case. There is no claim made by appellees that the additional room proposed to be constructed is needed for the accommodation of the children at this school. As a matter of fact, it is apparent that sufficient can be maintained, as there is no dispute but that

only two students are attending the school and that neither of them come from homes within the district, but are apparently residing therein temporarily.

The affairs of school districts are intrusted to officers generally designated as directors. The legislature in the fullness of its power, has seen fit to so intrust the administration of the conduct of schools in general, to the discretion of the directors or Board of Education, as the case may be. However, this is so only as distinguished between the directors and the patrons of the district. The board of directors may not go beyond their legal power and authority, as they are only agents appointed by statute to carry out the system provided for. They have no powers except such as are conferred by legislative act, or such as may arise by necessary implication, and ordinarily, doubtful claims of power are resolved against them. It is true they have a wide discretion in matters intrusted to their care, yet they are but an administrative body, charged with the duty of administering the law with respect to the public school within their district. It is their duty to administer the affairs of the district as directed by statute and within the power and authority vested. Their personal differences cannot be permitted to injuriously affect the interest of the taxpayers of such district, and when the situation comes to that place, their conduct may properly be restrained by injunction at the instance of such taxpayers. From the record in this case, we find nothing tending to prove that the additional room is necessary for the accommodation of the students attending the school.

The judgment of the lower court is therefore reversed and the cause remanded.

Reversed and remanded.

only two students are attending the school and that neither of them come from towns within the district, but are apparently residing therein temporarily.

The affairs of school districts are intrusted to officers generally designated as directors. The legislature in the fullness of its power, has seen fit to so frame the examination of the conduct of schools in general, to the direction of the directors or board of education, as the case may be. However, this is so only as distinguished between the directors and the patrons of the district. The board of directors may not go beyond their legal power and authority, as they are only agents appointed by statute to carry out the system provided for. They have no powers except such as are conferred by legislative act, or such as may arise by necessary implication, and ordinarily, doubtful claims of power are resolved against them. It is true they have a wide discretion in matters intrusted to their care, yet they are but an administrative body, charged with the duty of administering the law with respect to the public school within their district. It is their duty to administer the affairs of the district as directed by statute and within the power and authority vested. Their personal differences cannot be permitted to injuriously affect the interest of the taxpayers of such district, and when the situation comes to that place, their conduct may properly be restrained by injunction at the instance of such taxpayers. From the record in this case, we find nothing tending to prove that the additional room is necessary for the accommodation of the students attending the school.

The judgment of the lower court is hereby reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9508 AGENDA NO. 6

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| WILLIAM LATTIN, as Administrator of the Estate of Howard Lattin, deceased, Appellee, | |
| vs. | APPEAL FROM CIRCUIT COURT LAKE COUNTY. |
| CITY OF ZION, a Municipal Corporation, Appellant. | |

Per Curiam.

This was an action by appellee to recover for the wrongful death of his minor son Howard. Briefly stated, the facts out of which this case arose, are as follows: On Christmas eve, December 24, 1938, the deceased, Albert Anclam and John Tietz, spent most of the evening and night together visiting at various taverns. Somewhere near the hour of 4:00 o'clock on the morning of December 25th, they left a tavern known as Scotty's Place, on a motorcycle owned and operated by Anclam. They were proceeding east on 21st street, which is an outlying street but within the corporate limits of appellant city. It appears to be a rather untravelled street, without many people living in the vicinity of the place of the accident. When the boys left Scotty's Place, they mounted Anclam's motorcycle, with Anclam riding in front and controlling the operation of the machine. Tietz was riding

directly behind Anclam and the deceased was riding directly behind Tietz. In this manner they proceeded east on 21st street to a place about six hundred feet east of the residence of Robert Cherry. Here, the city through W.P.A. work, had been engaged in filling in a low place on 21st street. This fill was about two hundred sixty feet in length. It was higher than the old roadbed at both the west and east ends of the fill. It consisted of dirt which had been taken from the sides of the road, and which at the time in question was frozen and very rough. It appears that only one travelled track existed across this fill. There were two flares at the west end of the fill and two flares at the east end. Only one of the flares was burning at the time, which was at the west end of the fill and to the south side of the road. When Anclam approached this fill from the west, he states that he did not see it nor the flare, until too late to avoid the accident. When the motorcycle hit the fill, it threw Anclam and Tietz clear of the machine, and they apparently sustained no injuries of any consequence. The deceased evidently became fastened to the machine, and sustained injuries from which he died. The evidence shows that after the motorcycle hit the fill, it proceeded east for a distance of about two hundred forty eight feet, where it came to a stop at the side of the road and in an upright position.

The trial resulted in a verdict in favor of appellee in the sum of $2000, and appellant brings this appeal from judgment rendered thereon.

It is the position of appellant that the deceased was guilty of contributory negligence and this is considered to be the controlling factor in the case.

Anclam and Tietz both testified that they did not see the flare before striking the fill. There is nothing to indicate what the deceased saw, or what he might have said to the other two boys. Their testimony is silent on that point. It appears that the Cherry residence is at the top of a slight hill and about six hundred feet west of the west end of the fill. From the Cherry residence to the fill, is downhill. After the accident, Tietz walked back to the Cherry residence to secure help. This was shortly after four o'clock on Christmas morning. Cherry went with Tietz to the scene of the accident. He testified as a witness on behalf of appellee. He states that as he left his house, he could see the flare burning at the west end of the fill. He found the motorcycle within about fifty feet of the east end of the fill. Tietz testifies that when he started back with Cherry to the scene of the accident, he saw the flare burning. Cherry returned to his residence and reported the accident to the police department and called for an ambulance. Officer Simpson reported in a police car. The deceased was sent to the hospital. Cherry returned to the scene of the accident and then went to the police station. At the police station, Anclam and Tietz were questioned by various of the officers then on duty. Their statements regarding the accident were rather vague. In effect, they merely stated that they did not see the fill until they were upon it and did not see the flare, and that when they hit the fill they were thrown from the machine and did not remember anything thereafter until they came to at the side of the road. Anclam stated that he was going forty-five miles an hour. Tietz did not know how fast they were going, but thought it was faster. The evidence is in dispute as to the state of sobriety

Anglen and Fletz both testified that they did not see the flare before striking the fill. There is nothing to indicate what the deceased saw, or what he might have said to the other two boys. Their testimony is silent on that point. It appears that the Cherry residence is at the top of a slight hill and about six hundred feet east of the east end of the fill. From the Cherry residence to the fill, is downhill. After the accident, Fletz walked back to the Cherry residence to secure help. This was shortly after four o'clock on Christmas morning. Cherry went with Fletz to the scene of the accident. He testified as a witness on behalf of appellee. He states that as he left his house, he could see the flare burning at the west end of the fill. He found the motorcycle within about thirty feet of the east end of the fill. Fletz testifies that when he started back with Cherry to the scene of the accident, he saw the flare burning. Cherry returned to his residence and reported the accident to the police department and called for an ambulance. Officer [illegible] reported in a police car. The deceased was sent to the hospital. Cherry returned to the scene of the accident and then went to the police station. At the police station, Anglen and Fletz were questioned by various of the officers then on duty. Their statements regarding the accident were rather vague. In effect, they merely related that they did not see the fill until they were upon it and did not see the flare, and that when they hit the fill they were thrown from the machine and did not remember anything thereafter until they came to at the side of the road. Anglen stated that he was going fifty-five miles an hour. Fletz did not know how fast they were going, but thought it was [illegible]. The evidence is in dispute as to the [illegible]

of Anclam and Tietz. Anclam stated his age to be 18. Tietz stated his age to be 18. The deceased was 16.

Officer Simpson who answered the call placed by Cherry, testified that he saw the flare at the west end of the fill when he was about four blocks west thereof. Anclam, Tietz and Cherry were there waiting for him. He found the deceased lying at the side of the road. Officer Ruesch went to the scene of the accident. He states that when approaching the fill from the west, he saw the flare container at about five hundred fifty feet distance. Appellant's witness Wilson, accompanied officer Simpson and states that he saw the flare burning as they approached the fill from the west, and that in his opinion, they first saw it at a distance of from three to four blocks west of the fill.

The road at the place in question was not closed to traffic. W.P.A. labor had been engaged from time to time during the winter, filling in this low place by throwing dirt from the sides of the road into the travelled portion thereof. The testimony is that the travel on this road is rather infrequent. The witness Cherry, who apparently lived the nearest to the fill, states that he had been using it in driving to and from his home and his work. He says that the ground was frozen and rough and that over this fill there was but one travelled track. Each end of the fill was somewhat higher than the surface of the old road, and therefore caused a raise or bump. Anclam states that he had the headlight of his motorcycle turned on and could see two hundred feet down the road from the use of the headlight. He further states that he applied the brakes of the motorcycle about seventy-five feet before he reached the west end of the fill, but that

of Lenin and Stalin. Lenin wished his ego to be 1A.

Stalin wished his ego to be 1A. The General was 1A.

Officer Elegant was measured the hole planed by Gloomy, Realizing that he was the Stone in the West end of the Hill when he was about four blocks from Stalin. Lenin, Stalin and Gloomy were Stone walking for him. He found the General lying on his side on the road. Officer Elegant was a [illegible] some of the soldiers. He [illegible] Stone [illegible], the Hill from the West, he saw the Stone without [illegible] Stone hundred fifty feet distance. Lenin's [illegible] Stone, necessarial officer Elegant and Stalin that he saw the Stone looking as they approached the Hill from the West, and [illegible] in his opinion, they find out it is a distance of Stone [illegible] to four blocks west of the Hill.

The road at the place in question was [illegible] to traffic. W.P.A. labor had [illegible] this [illegible] during the winter, hauling in [illegible] low place by shoveling dirt from the sides of the road into the low-lying [illegible] tunnel. The tunnel is [illegible] a high road in [illegible]. The ultimate [illegible] the approach [illegible] the nearer to the Hill, whether Lenin had [illegible] in striking to and from his home and his work. [illegible] the [illegible] [illegible] Stone [illegible] Hill [illegible] [illegible] Stone [illegible] Hill was [illegible] [illegible] than the surface of the old road, [illegible] a [illegible] or [illegible]. Lenin drove [illegible] the headlights of his motorcycle turned on and could see two hundred [illegible] down the road from the [illegible] of the headlight. The Partner stated that he realized the [illegible] of the [illegible] about seventy-five feet before he reached the [illegible] of the Hill, [illegible]

he does not remember anything after he hit the fill. The evidence is not in dispute that the machine proceeded almost across the fill before it left the road and stopped in the ditch at the side thereof. The motorcycle had a third wheel attachment, which apparently kept it in an upright position.

The deceased had been in the company of Anclam and Tietz most of the night, and had ample opportunity to acquaint himself with all the surrounding circumstances, and to determine whether he desired to ride as a third passenger on this motorcycle. The accident was indeed a regrettable one.

This court is of the opinion that the verdict is not supported by the evidence.

Judgment is therefore reversed and the cause remanded.

Reversed and remanded.

he does not remember anything other he hit the hill. The evidence is not in dispute that the machine proceeded across the hill before it left the road and stopped in the ditch at the side thereof. The motorcycle had a bent wheel afterwards, which apparently kept it in an upright position.

The deceased had been on the company of Smith and Smith work of the night, and had ample opportunity to acquaint himself with all the surrounding circumstances, and to determine whether it would be safe as a third passenger on this motorcycle. The evidence has created a presumption.

This court is of the opinion that the verdict is not supported by the evidence.

Judgment is therefore reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

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|---|---|
| MARY B. SEVIER, Administratrix of the Estate of Albert E. Sevier, Deceased, Appellant, v. CHARLES P. MEGAN, Trustee of the Chicago and North Western Railway Company, a corporation, Appellee. | APPEAL FROM ORDER OF SUPERIOR COURT OF COOK COUNTY GRANTING A NEW TRIAL. |

305 I.A. 165

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband. There was a jury trial and a verdict and judgment in plaintiff's favor for $15,000. A new trial was awarded and this court granted leave to appeal.

The record discloses that Albert E. Sevier was employed by defendant as a brakeman and between 9 and 10 o'clock on the night of May 21, 1937, the southbound freight train consisting of 86 cars, on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buda, Illinois. Sevier got off the engine where he was riding on the fireman's or east side of the train shortly before the train stalled, walked back to see what was wrong and after the train stopped decided to cut it between the 36th and 37th cars.

The evidence tends to show he closed the angle cocks on the 2 cars, uncoupled the air hose, then crossed over to the engineer's or west side of the train, signalled the engineer to back up so he could pull the pin and thus cut the train at that point. The engineer backed up, as he testified, from 20 to 60 feet when the front section of the train ran into the rear section. The engineer further testified that from the time he received the signal he did not again see the signal lantern which Sevier had. The train crew consisting of the engineer, fireman, conductor and the rear brakeman, went along the

MARY E. SEVIER, Administratrix
of the Estate of Albert E. Sevier,
Deceased,

Appellant,

v.

SOUTHERN P. CORP., Trustee of the
Chicago and North Western Railway
Company, a corporation,

Appellee.

) APPEAL FROM COURT OF
) APPEALS FROM THE CIRCUIT COURT OF
) COOK COUNTY, DRAWING
) A JUR TRIAL.

305 I.A. 165

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband. There was a jury trial and a verdict and judgment in plaintiff's favor for $15,000. A new trial was awarded and this court granted leave to appeal.

The record discloses that Albert E. Sevier was employed by defendant as a brakeman and between 9 and 10 o'clock on the night of May 21, 1927, the southbound freight train consisting of 36 cars, on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Nada, Illinois. Sevier got off the engine where he was riding on the fireman's or east side of the train shortly before the train stalled, walked back to see what was wrong and after the train stopped decided to cut it between the 36th and 37th cars.

The evidence tends to show he closed the angle cocks on the 2 cars, uncoupled the air hose, then crossed over to the engineer's or west side of the train, signalled the engineer to back up so he could pull the pin and thus cut the train at that point. The engineer backed up, as he testified, from 20 to 30 feet when the front section of the train ran into the rear section. The engineer further testified that from the time he received the signal he did not again see the signal lantern which Sevier had. The train crew consisting of the engineer, fireman, conductor and the rear brakeman, went along the

train to ascertain what had happened and found that Levier was crushed and held between the bumpers of the 36th and 37th cars. He was instantly killed. Shortly afterward the front section of the train was taken south over the hill to a switch track where it was placed; the engine was then brought back and the second section was likewise taken south over the hill, and after the two sections were connected, the train proceeded.

The evidence further shows that when the angle cocks were closed, the air brakes with which the train was equipped, were out of use on the rear section but the engineer had control of the forward section; that after the air hose is uncoupled between the two cars and the angle cocks opened, this would set the brakes.

The testimony of the conductor and the rear brakeman is to the effect that after the train stalled and apparently after the cut was made, the rear section started back north or down the hill and then rather suddenly came to a stop as though the brakes were set.

At the close of all the evidence defendant moved for a directed verdict, which motion the court reserved. Thereupon the verdict was returned April 14, 1939, in plaintiff's favor. April 19, before judgment was entered, defendant filed a written motion for judgment notwithstanding the verdict. July 11, the court denied the motion and entered judgment on the verdict in plaintiff's favor for $15,000. Three days later, defendant filed a written motion for a new trial specifying a number of grounds. November 2, the motion was allowed and a new trial awarded. Counsel say the trial judge rendered no opinion and gave no reasons for awarding the new trial.

It is the theory of defendant that Levier met his death solely on account of his own negligence that after he closed the angle cocks on the two cars and uncoupled the air hose he neglected to open the angle cock on the rear section of the train before making the cut; that after he pulled the pin to make the cut (there being no brakes on the rear section of the train), it started down hill and

train to ascertain what had happened and found that Xavier was crushed and held between the bumpers of the 26th and 27th cars. He was instantly killed. Shortly afterward the front section of the train was taken south over the hill to a switch track where it was placed; the engine was then brought back and the second section was likewise taken south over the hill, and after the two sections were connected, the train proceeded.

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It is the theory of defendant that Xavier met his death solely on account of his own negligence, that after he closed the angle cocks on the two cars and uncoupled the air hose he neglected to open the angle cock on the rear section of the train before making the cut; that after he pulled the pin to make the cut (there being no brakes on the rear section of the train), it started down hill and

when Sevier saw this he hurried in between the two cars to open the angle cock on the south end of the south car of the north section of the train and thus set the brakes; that while he was in the act of doing this the engineer continued to back the other section of the train and when Sevier opened the angle cock, the north section stopped and he was crushed and killed.

On the other side, the position of counsel for plaintiff is "that there was substantial evidence for the jury, first, as to whether the engineer was negligent in the manner in which he backed the train *** without any warning or acknowledging signal for as much as 60 feet without any application of the automatic brakes *** so that a coupling pin could be lifted not more than 36 cars back " - that the engineer continued backing "after he saw the light which he said he saw, and assumed was Sevier's lantern, disappear from view." That the evidence shows the angle cock on the rear end of the 38th car was closed so that the engineer had complete control of the 36 cars and that he could have stopped the 36 cars in 2-1/2 seconds.

Counsel for plaintiff say that the trial judge, in awarding the new trial, adopted defendant's position holding "that as a matter of law no recovery could be had upon any view that could be taken of the evidence." We cannot concur in this statement in view of the fact that the trial judge rendered no opinion when he awarded the new trial because such action would be directly contrary to the order theretofore entered by him in overruling defendant's motion for judgment notwithstanding the verdict.

Plaintiff's position is that there were no procedural errors; that the question of liability was properly submitted to the jury who returned a verdict in plaintiff's favor, and that this court should reverse the order awarding the new trial and enter judgment on the verdict.

The controlling question in this case is whether the engineer was guilty of negligence which, in whole or in part, brought

when Taylor saw this he hurried in between the two cars to open the angle cock on the south end of the south car of the north section of the train and then set the brakes; that while he was in the act of doing this the engineer continued to back the other section of the train and when Taylor opened the angle cock, the north section stopped and he was crushed and killed.

On the other side, the position of counsel for plaintiff is "that there was substantial evidence for the jury, first, as to whether the engineer was negligent in the manner in which he backed the train *** without any warning or acknowledging signal for as much as 60 feet without any application of the automatic brakes *** so that a coupling pin could be lifted not more than 30 cars back " - that the engineer continued backing "after he saw the light which he said he saw, and assumed was Taylor's lantern, disappear from view." That the evidence shows the angle cock on the rear end of the 58th car was closed so that the engineer had complete control of the 59 cars and that he could have stopped the 59 cars in 4-1/2 seconds.

Counsel for plaintiff say that the trial judge, in granting the new trial, adopted defendant's position holding 'that as a matter of law no recovery could be had upon any view that could be taken of the evidence." We cannot concur in this statement in view of the fact that the trial judge rendered no opinion when he awarded the new trial because such action would be directly contrary to the order theretofore entered by him in overruling defendant's motion for judgment notwithstanding the verdict.

Plaintiff's position is that there were no procedural errors that the question of liability was properly submitted to the jury who returned a verdict in plaintiff's favor, and that this court should reverse the order awarding the new trial and enter judgment on the verdict.

The controlling question in this case is whether the engineer was guilty of negligence which, in whole or in part, brought

about Sevier's fatal injuries. So far as the evidence discloses, there were no defects in any mechanism of the train. At plaintiff's request, the jury were instructed that if they believed from a preponderance of the evidence, defendant was negligent and that Sevier was killed as a result "in whole or in part from such negligence" then they should find for plaintiff. And in other instructions submitted by plaintiff, the jury were told that if they believed from a preponderance of the evidence that the engineer, in the exercise of ordinary care, for the safety of the deceased, could have prevented the accident, their verdict should be for plaintiff. In instructions tendered by defendant, the jury were told that plaintiff alleged the train was equipped with defective air brakes yet there was no evidence to support this allegation and the jury should not consider that question in arriving at their verdict. That the plaintiff could not recover if they found from a preponderance of the evidence that the sole cause of Sevier's death was occasioned by his own act. We think these instructions properly presented the vital question to the jury.

Defendant contends that the court erred in refusing to give three instructions requested by it. By one of these instructions it was sought to tell the jury there was no evidence legally tending to prove that after the train stalled it "parted" or "broke in two" and that they "must not consider anything that has been said during the trial of the case on that subject in considering or arriving at your verdict. In other words 'the train parted' matter, contention or subject is out of the case and you will give it no consideration whatever." We think this instruction was properly refused. There is considerable argument in the briefs as to whether the signal given by Sevier to the engineer was a "back-up" signal described as a "circle at arm's length" which signal plaintiff contends under one of defendant's rules which was in evidence, was that the train had parted and was not a signal to back-up. There was no evidence that the "train parted" but that it was "cut" by Sevier in uncoupling it be-

about Davies's fatal injuries. So far as the evidence discloses, there were no defects in any mechanism of the train. At plaintiff's request, the jury were instructed that if they believed from a preponderance of the evidence, defendant was negligent and that Davies was killed as a result "in whole or in part from such negligence" then they should find for plaintiff. And in other instructions submitted by plaintiff, the jury were told that if they believed from a preponderance of the evidence that the engineer, in the exercise of ordinary care, for the safety of the deceased, could have prevented the accident, their verdict should be for plaintiff. In instructions tendered by defendant, the jury were told that plaintiff alleged the train was equipped with defective air brakes yet there was no evidence to support this allegation and the jury should not consider that question in arriving at their verdict. That the plaintiff could not recover if they found from a preponderance of the evidence that the sole cause of Davies's death was occasioned by his own act. We think these instructions properly presented the vital question to the jury.

Defendant contends that the court erred in refusing to give three instructions requested by it. By one of these instructions it was sought to tell the jury there was no evidence legally tending to prove that after the train stalled it "parted" or "broke in two" and that they "must not consider anything that has been said during the trial of the case on that subject in considering or arriving at your verdict. In other words 'the train parted' matter, contention or subject is out of the case and you will give it no consideration whatever." We think this instruction was properly refused. There is considerable argument in the briefs as to whether the signal given by Davies to the engineer was a "back-up" signal described as a "circle at arm's length" which signal plaintiff contends under one of defendant's rules which was in evidence, was that the train had parted and was not a signal to back-up. There was no evidence that the "train parted" but that it was "cut" by Davies in uncoupling it be-

tween the 36th and 37th cars. We think the instruction might also tend to confuse.

The next instruction which defendant contends was improperly refused, sought to have the jury "instructed that as a matter of law the failure of the engineer to respond, by blowing his whistle, to the back-up signal referred to in the testimony of the engineer, was not and could not be a proximate cause" of Sevier's injury and death and therefore the jury were not authorized to base their verdict in favor of plaintiff upon the claimed failure of the engineer to whistle after getting the back-up signal. We think this instruction was properly refused. The question was for the jury to decide whether Sevier had given the engineer a back-up signal and whether the engineer's failure to respond by blowing his whistle caused, in part at least, the fatal accident. The instruction would eliminate the evidence tending to show the engineer did not see any signal.

By the third refused instruction, defendant sought to have the jury told that even though they found defendant was negligent, yet if they also found Sevier was negligent and that except for his negligence he would not have been killed, their verdict should be for defendant. The jury were told in other instructions that plaintiff could not recover if they found that Sevier was killed solely as a result of his own negligence. This was sufficient.

There was evidence to the effect that no signal was given to the engineer to back up because Sevier was not in a position where he could give such signal on account of the curve in the track, trees and other obstructions.

There is considerable discussion in the briefs as to whether certain rules of the railroad company were applicable to the facts in the case and therefore admissible in evidence. We think it would serve no purpose to discuss these contentions in detail since we have reached the conclusion that we would not be warranted in distrubing the order of the court awarding a new trial. On a retrial of the case we think counsel would have no trouble in view of the facts disclosed by

tween the 58th and 57th cars. We think the instruction might also read as follows.

The next instruction which defendant contends was improperly refused, sought to have the jury "instructed that as a matter of law the failure of the engineer to respond, by blowing his whistle, to the back-up signal referred to in the testimony of the engineer, was not and could not be a proximate cause" of Xavier's injury and death and therefore the jury were not authorized to base their verdict in favor of plaintiff upon the claimed failure of the engineer to whistle after getting the back-up signal. We think this instruction was properly refused. The question was for the jury to decide whether Xavier had given the engineer a back-up signal and whether the engineer's failure to respond by blowing his whistle caused, in part at least, the fatal accident. The instruction would eliminate the evidence tending to show the engineer did not see any signal.

By the third refused instruction, defendant sought to have the jury told that even though they found defendant was negligent, yet if they also found Xavier was negligent and that except for his negligence he would not have been killed, their verdict should be for defendant. The jury were told in other instructions that plaintiff could not recover if they found that Xavier was killed solely as a result of his own negligence. This was sufficient.

There was evidence to the effect that no signal was given to the engineer to back up because Xavier was not in a position where he could give such signal in response of the cars in the train, inter and other observations.

There is considerable discussion in the briefs as to whether certain rules of the railroad company were applicable to the facts in the case and therefore admissible in evidence. We think it would serve no purpose to discuss these contentions in detail since we have reached the conclusion that we would not be warranted in disturbing the order of the court granting a new trial. In a retrial of the case we think counsel would have no trouble in view of the facts disclosed by

the evidence, in offering any rules which are not applicable.

Whether the engineer was guilty of any negligence in backing the train from 20 to 30 feet, as the engineer testified, in response to Sevier's signal so as to permit Sevier to cut the train, or whether to create the necessary slack it was only necessary to back the train a few feet, we do not pass upon. But in view of the entire record we are of opinion we would not be warranted in holding the trial judge clearly abused the discretion which the law reposed in him in awarding a new trial. Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402; Tone v. Halsey, Stuart & Co., 286 Ill. App. 169; Couch v. So. Ry. Co., 294 Ill. App. 490.

The order of the Superior court of Cook county awarding a new trial is affirmed.

ORDER AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

the evidence, in offering any rules which are not applicable.

Whether the engineer was guilty of any negligence in backing the train from 20 to 30 feet, as the engineer testified, in response to fireman's signal so as to permit fireman to cut the train, or whether to create the necessary slack it was only necessary to back the train a few feet, we do not pass upon. But in view of the entire record we are of opinion we would not be warranted in holding the trial judge clearly abused the discretion which the law reposed in him in awarding a new trial. Wagner v. Chicago Union Trans. Co., 288 Ill. App. 402; Tone v. Halsey, Stuart & Co., 298 Ill. App. 129; Lunde v. So. Ry. Co., 304 Ill. App. 420.

The order of the Superior Court of Cook County awarding a new trial is affirmed.

ORDER AFFIRMED.

Barnstrup, P.J., and Lindsay, J., concur.

**Stuart E. Pierson, Administrator de bonis non with Will Annexed of the Estate of David Meade Fishback, deceased, Plaintiff Appellant v. Louise Fishback, et al., Defendants-Appellees.**

**Gen. No. 9219.**



Mr. Presiding Justice Riess delivered the opinion of the Court.

The above cause comes to this Court upon a second appeal, from a decree of the County Court of Greene County, Illinois.

The original petition filed by Stuart E. Pierson, Administrator *de bonis non* with Will annexed of the Estate of David Meade Fishback, deceased, prayed for an order of court to sell all real estate of which said deceased died seized and possessed except certain homestead premises then occupied by Louise Fishback, widow of said deceased, for the purpose of paying debts and claims allowed or chargeable against said estate. A decree for sale of the real estate was entered, from which an appeal was taken to this Court, wherein the cause was duly heard and the decree of the lower court was reversed and set aside and the cause remanded to the County Court "for such other and further proceedings as to law and justice shall appertain". No specific directions were given in that opinion concerning the form of order to be entered by the lower court. The case is reported in abstract form as *Pierson* v. *Fishback*, 299 Ill. App. 627, 20 N. E. (2d) 329, in which opinion a full statement of the facts and issues arising in the former trial are set forth and need not be repeated in this opinion.

Upon filing the mandate of this Court in the court below, the plaintiff petitioner prayed leave to file an amended and supplemental petition for the purpose of retrying said cause. Upon the former appeal, it was held under the facts then in the record that petitioner's right to sell the premises would be barred by laches. The amended claim contains certain additional allegations seeking to justify the lapse of time before filing the petition and to make proof of additional facts

thereunder, and the supplemental petition set forth the conveyance of the premises sought to be sold in said proceeding by said Louise Fishback to David Donald Fishback, son of said deceased, and Jack McDonald and Gilbert K. Hutchens, including in addition to a 310 acre farm, a homestead property consisting of certain lots and dwelling house in the City of Carrollton, Illinois, which conveyances contained release and waiver of all homestead rights of Louise Fishback in the latter premises.

The Trial Court denied the appellant's motion for leave to file an amended and supplemental petition for sale of all the real estate except said homestead premises and found that the prayer of the petitioner should be denied as to sale of all real estate other than said homestead as being barred by laches; the entry of which orders were assigned as error by appellant herein.

In our former opinion reversing and remanding the cause, we held in substance that under the facts set forth in the record, the appellant should have been permitted to refile her claim against the estate, to assert her rights to rents and profits, and upon allowance of her claim, be permitted to prorate with other sixth class creditors.

The lower court erred in denying the appellant's right to file an amended and supplemental claim alleging additional facts and joining the grantees named in the deeds and creditors as additional defendants, to be followed by a rehearing upon the merits.

The cause is therefore reversed and remanded with directions to the Trial Court to set aside its decree of August 4, 1939, and to permit the filing by the appellant of an amended and supplemental complaint and joining additional parties.

*Reversed and Remanded with Directions.*

14 (A-19598—14)

**Lottie Biehl, et al., Plaintiff-Appellees, v. The H. N. Schuyler State Bank of Pana, Illinois, (Defendant-Appellees), First Presbyterian Church of Pana, Illinois, Louisa Clarke, Amelia Granda, et al., Defendant-Appellants. Oscar Nelson, Auditor of Public Accounts, Ex Rel., Plaintiff-Appellees, v. The H. N. Schuyler State Bank of Pana, Illinois, Defendant-Appellees, Intervening Petition of Louisa Clarke, Amelia Granda and The First Presbyterian Church of Pana, Illinois, Plaintiff-Appellants.**

305 I.A. 166

**Gen. No. 9206**

Mr. Justice Fulton delivered the opinion of the Court.

This is an appeal from two decrees rendered by the Circuit Court of Christian County in two cases which were consolidated by stipulation for the purposes of this appeal, and by agreement of the parties, tried and submitted on one record.

The H. N. Schuyler State Bank of Pana, Illinois, closed its doors on February 6, 1930. A suit was filed in the Circuit Court of Christian County by the State Auditor of Public Accounts for the purpose of liquidating the affairs of the bank, and on April 21, 1930, one A. W. Frankenfeld was appointed Receiver. This cause bore the general number 11178. On May 13, 1930, the Plaintiff-Appellees, being depositors and creditors of the bank, filed a representative stockholders liability suit, seeking to recover assessments on the bank stock of said institution. This suit was numbered 11180.

The controversies in the case arise over the administration of a trust and the handling of the estate of one Kate A. Comstock. She was the owner of 80 shares of stock in The H. N. Schuyler State Bank from 1907 up until the date of her death in 1923. The Bank was engaged in the general banking business but was not

authorized to take and execute trusts. On January 23, 1922, Mrs. Comstock made and executed a Trust Agreement concerning all of her property, wherein and whereby, she appointed the said Bank as Trustee to handle and dispose of her entire estate. In the first clause of the instrument she instructed the Trustee to convert the 80 shares of bank stock into money to be added to her cash balance on deposit in said bank, to be used in the payment of her debts and a large number of bequests, aggregating over twenty thousand dollars. The trust instrument directed that many of said bequests be paid within one year after her decease. Others were to be paid in payments running from five to twenty years and others when children became of age.

To the Appellant, The First Presbyterian Church of Pana, Illinois, was bequeathed the sum of $5,000.00, to be held by the Trustee for a period of twenty years, and only the income paid to the church annually during that time. After the expiration of the twenty year period the principal was to be paid to the church as needed. To the Appellants, Louisa Clarke and Amelia Granda, was given the sum of $2,000.00 each to be paid in installments during a five year period after the death of Mrs. Comstock.

At the death of Mrs. Comstock all of her property was in the hands of the bank. Subsequent to the date of her death, the expenses of her last illness were paid and during the year 1925, a number of the gifts or bequests mentioned in the Trust Agreement were paid by the Bank. The Bank stock was never converted into cash and in March, 1926, it was transferred to the four residuary beneficiaries in kind, each taking 20 shares.

At date of death the checking account for Mrs. Comstock amounted to $3,000.00. The account was carried on after her death, and the business of the Estate handled by the Bank. When the Bank closed, the Receiver took possession of the trust property.

In April, 1933, A. W. Frankenfeld resigned as Receiver of the Bank and Nora Molz was appointed Successor Receiver.

In the Stockholders liability suit, the Appellants were not made parties in the original complaint, but in September 1934, the Appellees filed an amendment to the complaint making the Appellants and Nora Molz, as Receiver of The H. N. Schuyler State Bank, additional parties defendant for the purpose of recovering the liability on stock owned by Kate A. Com-

stock during her lifetime and afterwards until said stock was transferred on the records of the bank on March 29, 1926. By the Amendment, the Appellees claimed a first lien on all of the assets of the said Kate A. Comstock coming into the hands of the bank. It further asked that all of said assets of the trust be applied on the liability due to the Creditors of said bank and in case of a deficiency after the application of said assets that the Appellees recover from Appellants to the extent that each had received assets from said trust.

The same complaint was amended on several other occasions, the last one being filed on March 14, 1938. In April, 1935, the Appellants filed an answer to the complaint as then amended. The answer alleged that the Bank wrongfully accepted the trust and that Nora Molz, as Receiver, took possession of the trust property without qualifying as Trustee. It also averred that Nora Molz was not authorized to take or administer said trust; that the cause of action did not accrue to the Appellees at any time within five years before the commencement of the suit, and that said Trustee wrongfully took and converted the trust funds. On July 27, 1936, the Appellants, by leave of Court, filed a cross-complaint charging the same matters set forth in their answer. On July 27, 1936, the Appellants filed a petition in the liquidation suit asking for the removal of the said bank and Nora Molz, Receiver as Trustees of the said Trust Estate. The petition charged that the Receiver had been cooperating with the Creditors of the Bank to dissipate the trust funds which the said Nora Molz was holding for the benefit of the petitioners.

In May, 1935, Nora Molz, Receiver, answered the amended complaint in the Stock liability suit, and later an amended answer admitting the acceptance of the trust by the bank, setting forth certain acts of the said bank as said trustee, and admitting that she had in her hands, as Receiver of said Bank, the sum of $7,425.00, belonging to said Trust.

Voluminous motions and amendments were filed during the progress of the suits but the original complaints, as amended, the cross-complaint and the intervening petition were all answered and the case at issue at the time of the hearing before the Court.

The proofs, in addition to those already stated and those disclosed by the pleadings, show that after the death of Mrs. Comstock in 1923, her account was car-

ried on by the bank until the time of closing its doors in 1930, and thereafter by the Receiver to the year 1935. Beginning with July 1, 1925, $75.00 had been paid the Appellant, First Presbyterian Chuch of Pana, Illinois, by the bank semi-annually until November 23, 1928, when there was paid the church $150.00, and the same amount again paid to the Church on December 28, 1929.

After the bank was closed by the Auditor, the Appellants filed general claims in the liquidation suit against the bank based on the said trust agreement, which claims were allowed in the amount of $5,000.00 to the Church and $2,000.00 to Amelia Granda and Louisa Clarke respectively. Afterwards on April 1, 1931, the Receiver paid a general dividend of 12½%, and paid to the First Presbyterian Church $625.00 as a dividend on its claim. He also paid the Appellants Amelia Granda $250.00 and Louisa Clarke $250.00. On January 15, 1934, a second dividend of 5% was paid to all general creditors and at that time there was paid to the Church $250.00, Amelia Granda $100.00 and Louisa Clarke $100.00. A little later, the Trustees of the First Presbyterian Church filed a petition in suit No. 11178, asking that their claim against said bank be reconsidered and re-allowed as a preferred claim, and on May 21, 1934, a decree was entered in said cause allowing the claim of the Church in the sum of $4,125.00, being the amount of $5,000.00, less the dividend payments of $875.00, as entitled to a preference. In the same manner in July 1935, the claims of Amelia Granda and Louisa Clarke were allowed as preferred claims in the amount of $1,650.00 each, being the sum of $2,000.00 in each case, less the dividend payments of $350.00, to each claimant. The basis of the claims for preference was that the bank had previously acted during its period of solvency as a Trustee ex maleficio of the Comstock Trust. Immediately thereafter, Nora Molz, as Receiver of the bank, set up as a reserve the sum of $7,425.00, being the aggregate of the said three preferred claims.

In cause No. 11178, being the liquidation suit, the Court dismissed the intervening petition of Appellants on the ground that as claimants the petitioners had previously gone into the Circuit Court and had, at a former term of Court, their claims determined to be preferred and judgment or decree taken accordingly. That as to any relief prayed, the intervenors had been guilty of laches.

In cause 11180, being the stockholders liability suit, the Court found that the Appellees recover the sum of $8,000.00 from the trust estate in manner, to-wit: That all monies in the hands of Nora Molz, as Receiver of The H. N. Schuyler State Bank, which were identifiable as coming from the Estate or Trust fund of the late Kate A. Comstock, including all monies held by said bank at the time of its closing, and against which the preferred claims of Appellants were allowed and impressed, should to the amount of $8,000.00, be paid over by said Receiver, in due course of administration to the Receiver appointed in this cause.

That the claim of the Appellees should be satisfied first, and prior to the claims of the Appellants under their preferred claims, and that any interest the said Appellants might have to any funds in the hands of said Receiver, accruing from the Comstock Estate or Comstock Trust be subservient to the claim of said creditors.

That Appellees were not entitled to recover from the Appellants any sums heretofore paid to them by the Bank or its Receiver.

Decrees were entered in each case in accordance with the findings of the Court. Appellants have prosecuted an appeal to this Court seeking to reverse the judgments of the Circuit Court as set forth in said decrees. The Appellees have filed a cross-appeal in suit 11180, alleging that the Court erred in holding that Appellees, as complainants in said cause, were not entitled to recover from the Appellants, First Presbyterian Church, Louisa Clarke and Amelia Granda, the respective sums of money paid them by the said bank or the Receivers thereof, prior to making them parties Defendant in said suit.

It is first contended by Appellants that the Trustee should be required to pay the entire assessment against the stock held by Kate A. Comstock because of the mismanagement of the Estate, and that all of the loss that accrued was due to the manner in which the Trustee handled the Trust Estate. They particularly complain that the Trustee should have converted the eighty shares of stock in The H. N. Schuyler State Bank into money for the purposes of distribution; that the Bank had been guilty of devastation of the estate in that it accepted and attempted and did execute the provisions of the Trust Agreement, although they were not qualified under the banking laws of Illinois to either take or execute trusts; that the Bank was guilty of mis-

management of the Trust in that it took the amount donated to Amelia Granda and Louisa Clarke and converted it to its own use; that the Receiver of the Bank, acting as Trustee of the Comstock Estate, marshalled the assets of the Estate in a manner that was most advantageous to it, the Receiver of the Bank, and that the bank did not proceed to loan the money due to the First Presbyterian Church and the other individuals as directed by the Trust Agreement.

It is conceded by all the parties that The H. N. Schuyler State Bank had no power or authority whatever to accept and execute trusts, but the record in the case does not disclose any glaring evidence of misconduct in the handling of the funds of the Comstock estate. The fact that the eighty shares of bank stock were not converted into money but distributed in kind to the four residuary beneficiaries was not harmful to the trust estate because the cash would have been paid out at the time of distribution, either to the residuary beneficiaries or for other purposes connected with the settlement of the estate. This distribution was made in 1926 before the closing of the bank.

Because the bank was not qualified to accept or execute trusts does not affect the rights of the parties, especially when there is no proof of any mishandling of the funds. The money and the property of the estate appears to have been paid or delivered to the proper persons who were entitled to the same, and it was not established by the evidence that there was a diversion or misappropriation of the funds.

Just why the installments falling due to the Appellants Amelia Granda and Louisa Clarke on January 1st of each year after the death of Kate A. Comstock were not paid is not fully explained, but the Receiver in her answer states that she set aside a reserve sufficient to pay the legacies due to said Appellants and still has the full amount on hand, and is holding the same subject to the orders and dictates of the Circuit Court of Christian County.

Under the trust agreement H. N. Schuyler was given the sum of $1,000.00. After the closing of the bank a claim was filed and allowed for this amount. It was later set off by the Receiver against a note that Schuyler owed the bank. A similar disposition was made of a bequest of $500.00 to James Palmer. We can see no evidence of misconduct in such an adjustment of accounts.

Even though the terms of the trust were not promptly and accurately carried out by the Bank and its Receiver that does not in our judgment have any weight on the question of whether or not the claim or lien of the Appellees for enforcing stock liability was prior to that held by the Appellants. The full liability on the Comstock shares of stock had accrued prior to the death of Miss Comstock. This is definitely shown by Certificates of deposit and savings account books offered in evidence.

The Constitution of the State of Illinois, Article XI, Section Six, provides that—

> "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock, by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

Our Courts have frequently held that the estate of a deceased stockholder is liable upon the stock held and owned by the decedent in the same way and to the same extent that the stockholder was liable in his lifetime. The only manner in which an estate can be relieved of this constitutional liability as a stockholder is by compliance with the provisions of the Administration Act, and by the running of the general Statute of Limitations. *Sanders* v. *Merchants State Bank*, 349 Ill. 547.

The fact that the bank, as Trustee, was authorized to sell the stock and failed to do so did not relieve the stock of its primary liability to the creditors of the bank which accrued before the death of Kate A. Comstock.

It is further contended by the Appellants that the Statute of Limitations has run against the claim of the Appellees; that the funds of the estate had been distributed to the Trustee for the benefit of the cestui que trusts and were no longer a part of the Estate of Kate A. Comstock. The indebtedness upon which the liability in this case is based is represented and shown by a large number of certificates of deposit, which were payable on presentation after maturity and endorsement of the respective certificates. Also upon a number of savings accounts which were represented by pass books which provided for the withdrawal of the money upon presentation of the pass book and the giving of a receipt. All of these evidences of indebtedness were in writing and hence the ten year Statute of Limitations applies. The records of the bank show

that interest was credited on nearly all of the certificates as late as 1929, and that the last interest was credited on the savings accounts during the last year before the bank closed. The bank closed on February 6, 1930. It would seem by such records that all of these debts were clearly renewed within the last year prior to the closing of the bank. The amendment to the complaint filed by the Appellees, by which Appellants were made parties defendant was filed September 4, 1934.

While a large part of the distribution of the trust estate was made during the years 1925 and 1926, the funds due to the Appellants were never definitely set off to the trustee for the benefit of the cestui que trusts and segregated from the assets of the estate. After the decree was entered in the liquidation suit allowing the claims of the Appellants to be preferred and in the aggregate sum of $7,425.00, Nora Molz, as Receiver of the Bank, set up as a reserve the said amount in order to pay the said preferred claims, and by her answer and report filed in said cause still has such sum in her hands awaiting the order of Court as to the proper parties to pay the same. It is our judgment that the suit filed by the Appellees in May 1930, and as amended in September, 1934, for the purpose of collecting the constitutional liability of the stockholders was not barred by the Statute of Limitations and the Court correctly found that the sum of $8,000.00, be recovered from any monies in the hands of Nora Molz, as Receiver of The H. N. Schuyler State Bank, which were identifiable as coming from the estate or trust fund of Kate A. Comstock, deceased. Also that the claim of Appellees be satisfied first and prior to the preferred claims of the Appellants.

The compromise and release of the liability of Ruth Schuyler Cole, owner of twenty shares of the bank stock, wholly independent and entirely separate from any of the 80 shares belonging to Kate A. Comstock during her lifetime, did not operate as a release of the liability of any other stockholder.

In July, 1936, the Appellants filed a petition in the liquidation suit asking for the discharge of The H. N. Schuyler State Bank and Nora Molz, Receiver of said Bank as Trustees of the said Trust Estate. While it is clear that the said Bank was not authorized to accept or execute trusts, the Appellants in this case dealt and co-operated with the bank in the capacity of Trustee over a period of several years, accepting payments upon their particular bequests. The record

shows that everything has been paid of the Trust funds of the Comstock Estate, except the amount of $7,425.00 reserved by the Receiver to meet the preferred claims, the payment of which is subject to the order of the Circuit Court. Under such circumstances the removal of such Trustee would accomplish nothing and might necessitate additional costs. Such petition was properly denied.

We believe the Circuit Court further correctly held that the Appellees as complainants in the stockholders liability suit were not entitled to recover from the Appellants, First Presbyterian Church, Louisa Clarke and Amelia Granda, the several sums paid to them by the bank, or the receivers of said bank prior to their having been made parties defendant to said suit. All of such payments were made voluntarily and without any notice that the claim of Appellees would be asserted later. As to such payments the Appellees were clearly guilty of laches and can not now recover.

Appellants challenge the jurisdiction of the Court to entertain the stockholders liability suit because they say the Statute does not authorize the bringing of any cause of action of this character against anyone but the stockholders and that Appellants were not stockholders. The right of creditors to sue in equity to enforce stockholders liability has been repeatedly uphold by our Courts. *Sanders, et al.* v. *Merchants State Bank, et al.* 349 Ill. 547. *American National Bank* v. *Holsen*, 331 Ill. 622. In the latter case the Court held that the two facts essential to sustain a decree enforcing liability of a stockholder are that the plaintiffs should be creditors and the defendants found to be stockholders. In *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564, it was held that where a claim against a deceased person has remained contingent during the whole period allowed by law for presenting claims against the estate and does not ripen into an absolute liability until the estate has been distributed to the legatees under the Will, the claimant may maintain a bill in equity against such legatees to reach the property of the estate received by them. The funds sought to be reached were in the hands of Nora Molz, as Receiver, and as such she became an equitable garnishee, and the Court had jurisdiction to reach said funds by a suit in equity.

It is our judgment that the trial Court did not err in his findings or in the Decree entered and the same is therefore affirmed.

*Affirmed.*

**Louise Wist, As Administratrix of the Estate of Arthur B. Wist, deceased, Plaintiff-Appellee, v. Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a corporation, and Thomas C. Russel, Defendant-Appellants.**

**Gen. No. 9145**

305 I.A. 167

MR. JUSTICE HAYES delivered the opinion of the Court.

This case grows out of a railroad-crossing accident in the Village of Sibley, Illinois, on December 18, 1936, in which plaintiffs decedent was killed.

Sibley, Illinois, is an incorporated village of about four hundred inhabitants, located in Ford County. State route number 47 runs north and south on the west edge of the village, and about half a block west of and parallel to the Wabash railroad. The principal business block is on Sciota Street, and runs north and south. The Wabash railroad runs generally north and south bearing at a slight angle in a northwesterly direction as it comes into the village from the south and goes through the village. Ohio Street runs east and west and is the main thoroughfare connecting route 47 with the business section. The intersection of Ohio Street and Sciota Street constitutes the principal business corner of the town. The main track of the Wabash railroad intersects Ohio Street at an angle less than a right angle, being eighty two degrees twenty one minutes. The depot is located just north of Ohio Street on the west side of the tracks. In addition to the main track, at the intersection of Ohio Street, there is a passing track which is 13.1 feet east of the main track, and a house track which is 11.1 feet east of the passing track. These three tracks which cross Ohio Street are planked. The crossing has the usual post and cross-arms bearing the word "railway crossing". The intersection of Sciota and Ohio Street is two hundred sixty feet east of the Wabash main track. The Brandt Grocery Store is located at the northeast corner of Sciota and Ohio Street. At about eleven thirty o'clock on the morning of the day of the accident, Arthur B. Wist stopped at the Brandt Store. He had

a heavy load of flour and other merchandise on his truck. He received an order for sixteen sacks of flour which he unloaded. He was late on his route and in a hurry and suggested to Mr. Brandt that they let the pay for the flour go until the next trip. He had been calling at the Brandt Store since the preceding April from one to three times a month, coming in from Bloomington on State Route 165. At Sibley, both state routes 47 and 165 are located on the west side of the Wabash track and do not run directly into the village. Most of the traffic from these state routes coming into the village cross on Ohio Street. The daily average of motor cars crossing the Wabash track at Ohio Street runs from three to four hundred. About one block south of Ohio Street and on the west side of Sciota Street is a concrete, block garage building, that extends from Sciota Street west to within sixty or seventy feet of the east rail of the Wabash main track. Just south of Ohio Street and off the east side of the right-of-way of the Wabash railroad and parallel to the track there are a row of trees,—ten in number—then two additional trees just east of the last tree on the south end. These trees are from twelve to fourteen inches in diameter and sixteen to seventeen feet apart. There is a tool house nine by fourteen, ten feet high which is five hundred forty-four feet south of Ohio Street and twenty five feet east of the main track. At the southwest corner of the intersection of Ohio and Sciota Street is a frame building occupied by Doctor Absher as an office and just west of that is another frame building used as a beauty shop. The west side of this last building is one hundred fifty-eight feet east of the Wabash main track.

It appears from the record that when Arthur Wist left the Brandt Store, he could look down Sciota Street across the fields south of the village and see the Wabash track. After he left the intersection, his view to the south was obstructed first by the doctor's office; second by the beauty shop; and after he passed these, by the garage building which is about one block south of the doctor's office and runs within seventy feet of the track. Traveling west far enough to clear the west side of the garage building, his view was partially obstructed by the row of trees and the small tool house just west of the garage. The fact that the track bore at a slight angle to the southeast from Ohio Street, narrowed the distance from which he could see. The elevation of the track on Ohio Street and the territory

adjacent to the south were about on a level. At the time of the accident, the deceased was in the employ of the General Mills Inc., driving their Ford V-8, one and a half ton truck, 1936 model, paneled body, cab enclosed with glass.

The train in question was a passenger train having six cars, which was twenty-four minutes late and was traveling at about seventy miles per hour. They had left Decatur twenty-five minutes late. The train had scheduled two stops between Decatur and Chicago, one at Forrest for water, and one at Englewood to discharge passengers. The accident happened at twelve-eighteen P. M. The engineer testified that he made the station whistle for Sibley one long blast of the whistle, and at a quarter of a mile south of Ohio Street, he started the crossing whistle, which consisted of two longs, one short, and one long blast, which continued from the whistling post up to the crossing. As he finished the second blast, he noticed a car through the trees coming at a moderate rate of speed, whereupon he changed his whistle from the regular crossing whistle to successive short blasts trying to attract the attention of the driver of the car, and then set his brakes in emergency. It was too close, "he couldn't save him".

The plaintiff produced one witness that stated he didn't hear any whistle, but the defendants had a number of witnesses who testified definitely on this point, which clearly shows that the whistle was blown in the manner described in the engineer's testimony. It was in the Winter and the cab windows in the truck were closed. At this same time and just north of the crossing on the house track, a box car was standing, and just a block north of the crossing on the east side of the track—and close to the house track—was a large grain elevator which obstructed the view, to some extent, from the north. The records shows that Arthur Wist approached the crossing at a very slow speed. Some witnesses put it at the rate of three miles per hour and some at the rate of five miles per hour. A fair analysis of the evidence and of the surrounding circumstances show that at a point thirty-three feet east of the east rail of the main line, he could see the track south for about four hundred fifty feet. The decisive point in the case is whether or not he exercised due care for his own safety or was guilty of contributory negligence. In considering this point we are dealing in seconds. With the train traveling at seventy

miles an hour, there is but three or four seconds time between the time he first had an opportunity to see the train and the collision. At that time he was called upon to watch from the south as well as the north. In passing upon his conduct at this crucial moment, we have to face the situation as it appeared to him.

It appears from the record that he had passed the first two tracks and was on the main track by the time of the collision, as the truck was thrown north and to the west side of the track and up against the depot building. The engineer testified, "He was three or four hundred feet south of the crossing when I changed the whistle from long blasts to short blasts." The fireman testified, "Why he blew two blasts of the whistle then gave a warning whistle and at the same time set the air in emergency and the crash came right now." The computation of time; the position of the train; and the situation of the deceased at a given time are all question of fact for a jury.

A train runs on a fixed track and is slow to start and slow to stop, and cannot be steered around objects or obstructions. A railway crossing is a known place of danger and a driver approaching the railway crossing with an oncoming train which he has knowledge of, or in the exercise of due care for his own safety he could ascertain, he is required to stop, and if he fails to do so, he is guilty of contributory negligence which bars the right of recovery.

Counsel for defendants with great emphasis insist that, under the record, they are entitled to a finding by this court, and that the verdict is manifestly against the weight of the evidence. With this view we cannot agree, but it does appear that it is a close case on the evidence.

Plaintiff charges in her complaint that this was a dangerous crossing; that the railroad provided no watchman, gates, wig-wag signals, light signals, bell signals, or other mechanical signal at said crossing to give warning of the approach of trains. The proof showed the only safety warning given by the railroad was the statutory cross-arms with the words "railroad crossing" thereon.

In the case of *Wagner* v. *T. P. & W. R. R. Co.*, 352 Ill. 85, the Court says:

> "The rule in this state is that one crossing a railway track must approach it with an amount of care commensurate with the known danger, but if the existence of the track would not be revealed to one

in the exercise of reasonable care the rule cannot apply. A railway company in the running of its trains is required to exercise ordinary care and prudence to guard against injury to those who may be traveling upon the public highway in crossing its tracks. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety or common prudence may dictate. The ringing of a bell and the blowing of a whistle are not alone sufficient to excuse a railroad company from maintaining other means of warning the traveling public when conditions are such as shown in the case at bar."

While it is true that the public is demanding lighter and faster transportation and the railroads, in keeping pace with the progress of the times, are warranted in furnishing this service, yet in doing so they should bring up the crossing signals for the traveling public so as to keep pace with their increased speed. The whistle, bell and cross-arm that served for so many years when trains were run from twenty to thirty miles an hour are lacking in public safety for the modern-day, stream-lined passenger train which travels at a rate three or four times as fast.

Defendants contend that the deceased and his employer were under the Workmen's Compensation Act, although this does not expressly appear in the record, except by an affidavit filed in support of a motion for a new trial and after verdict. All that the record shows is that the deceased was in the employ of the General Mills Inc., and worked out of Peoria, Illinois, selling and delivering articles of food with a Ford truck. Defendants further contend that plaintiff should have alleged that defendants were engaged in Interstate Commerce, and were not under the Act. It appears from examination of the pleading that in each of the four counts that were submitted to the jury, the defendants were charged with possessing, using and operating a certain railway which said railway then and there extended from the City of Chicago, in the State of Illinois, through the corporate limits of the Village of Sibley, in the County of Ford in the State of Illinois, thence in a southwesterly direction through the State of Illinois to the City of St. Louis, in the State of Missouri, and that said defendants were also then and there possessed of and operating a locomotive engine with a train of baggage, express, mail and passenger cars attached on said railway, and although

the pleading does not specifically state that the defendants were engaged in Interstate Commerce it states sufficient facts from which that inference can be reasonably deducted. This allegation would, in all probability, be insufficient when tested before trial and verdict by a motion to strike, but after verdict where no motion has been made, it is ample to support the verdict.

After verdict, the rule by which pleadings are construed against the pleader is reversed and anything necessary to be plead which may fairly be inferred from the declaration may be regarded as alleged. *Wagner* v. *C. R. I. & P. Ry.,* 277 Ill. 114. The question raised in the Wagner case was whether the declaration sufficiently charged that Wagner was engaged in Interstate Commerce at the time he was injured. The language used was ambiguous and cumbersome. In passing on this point, the court says:

> "The declaration as tested by a demurrer might properly have received that construction, since it referred to the previous averment that the defendant was engaged in inter-State commerce, but after verdict the rule by which pleadings are construed against the pleader is reversed and anything necessary to be proved which may fairly be inferred from the declaration will be regarded as alleged. A favorable construction of the declaration to support the verdict would be that the defendant being engaged in inter-State commerce, and it being the duty of the plaintiff, as an employee, to couple the cars, it might fairly be inferred that he was engaged at the time in an act included in the business carried on by the defendant in inter-State commerce."

A railroad company engaged in Interstate Commerce is not subject to the Workmen's Compensation Act. *Goldsmith* v. *Payne,* 300 Ill. 119.

The trial court denied defendants' motion for a severance. The engineer of the train in question was joined as a defendant with the receivers of the railroad company. We are of the opinion that the ruling of the court was correct. Error is assigned on the form of verdict given by the court which did not separate the defendant, Russell the engineer, from the receivers. Only two forms of verdict were given for the defendants,—one finding the defendants all guilty, and the other finding the defendants not guilty. In the case of *Meece* v. *Holland Furnace Co.,* 269 App. 164 (Third District), this court says:

"It necessarily follows that if the agent charged with the commission of the act complained of be not guilty, a judgment could not be recovered against appellee, the principal, upon the ground of respondeat superior. The judgment in this case in favor of the City of Chicago is a complete bar to an action against the appellee for its negligence in exercising any permissive rights appellee may have granted it. To make appellee liable upon the theory under discussion, a case must have existed against the city." To the same effect are *Anderson* v. *West Chicago St. R. Co.,* 200 Ill. 329; *Larson* v. *Hines,* 220 Ill. App. 594; *Bunyan* v. *American Glycerin Co.,* 230 Ill. App. 351. In the last case cited the court held: "In this State the law is well settled that where an action on the case is brought against two defendants and one of them is liable only on account of the rule of respondeat superior for the negligence of the other, if the latter is found not guilty such finding is a complete bar to the action against the former. *Hayes* v. *Chicago Tel. Co.,* 218 Ill. 414; *Anderson* v. *West Chicago St. R. Co.,* 200 Ill. 329; *Antrim* v. *Legg,* 203 Ill. App. 482; *Larson* v. *Hines,* 220 Ill. App. 594; *Billstrom* v. *Triple Tread Tire Co.,* 220 Ill. App. 550. The weight of authority outside of Illinois seems to be to the same effect. *Doremus* v. *Root,* 23 Wash. 710, 54 L. R. A. 649; *Hayes* v. *Chicago Tel. Co.,* 218 Ill. 414. 2 L. R. A. (N. S.) 764; *McGinnis* v. *Chicago, R. I. & P. Ry. Co.,* 200 Mo. 347, 9 L. R. A. (N. S.) 880; *Southern Ry. Co.* v. *Harbin,* 135 Ga. 122, L. R. A. (N. S.) 404; *Hobbs* v. *Illinois Cent. R. Co.,* 171 Iowa 624, L. R. A. 191 7 E. 1023."

In the present case, the charge by the plaintiff is the negligent operation of the train as it approached and crossed the crossing in question, while under the complete control of the engineer. If he was guilty, the receivers were guilty under the doctrine of respondeat superior, and if he was not guilty, the receivers were not guilty, so that the trial court was warranted in instructing the jury in the form that it did.

The defendant Thomas C. Russell, the engineer, was called by plaintiff in plaintiff's case in chief, under section 60 of the Civil Practice Act, for cross examination by the adverse party and after this cross examination was completed, the defendants asked the court to be permitted to cross examine him. This was denied,

in which ruling there was no error. Counsel in their brief now suggest that what they intended to say was, for leave to examine. Upon examination of section 60, and taking into consideration rules of practice and procedure in a nisi prius court, the defendants were properly entitled to examine him as is usual on what is commonly called re-direct, for the purpose of clarifying or explaining evidence brought out in the cross examination, but the request in the trial court was not for this, but for the right to cross examine. It appears from the record that this witness was afterwards called in behalf of the defendant and testified fully on the case so there was not error in this regard.

In the giving and refusing of instructions and in the arguments of counsel at the trial, we find no error sufficient to warrant a reversal. The case was properly submitted to a jury on questions of fact under the issue. Nothing appears in the record to warrant setting aside the verdict of the jury, nor the judgment of the court below. It is therefore affirmed.

*Judgment Affirmed.*

14 (A-19598—14)

**In the Matter of the Estate of Santi Paffi, Incompetent, Joe Menichetti, Conservator, Appellant, v. Frank T. Hines, Administrator of Veterans' Affairs, and H. R. Pool, Guardian ad Litem for Santi Paffi, Incompetent, Appellees.**



**Gen. No. 9218**

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from an Order and Judgment of the Circuit Court of Sangamon County, which affirmed the Probate Court of Sangamon County in sustaining objections to an investment of nine thousand five hundred ($9,500.00) dollars, made by Joseph Menichetti, Conservator of the Estate of Santi Paffi, Incompetent, in mortgage bonds of the Joseph Brothers Lumber Company, and charging the conservator with said amount, together with the accrued interest, aggregating thirteen thousand three hundred ($13,300.00) dollars.

It appears from the record, that the conservator, before making these investments, had applied for and obtained the approval of the Probate Court of Sangamon County, and had annually filed a report of his acts and doings, which reports were approved by the Court up to July 20, 1933. The subsequent reports were not approved as to the investments in the Joseph Brothers Lumber Company Bonds. No guardian ad litem was appointed or appeared for the Ward at the time of conservator's application for authority to make the investments in question, nor was any notice given to the ward or to anyone on his behalf. These proceedings were ex parte.

The conservator filed a current report in the Probate Court, covering the period from July 20, 1933, to July 16, 1934. The Administrator of Veterans' Affairs filed objections to said report, on the grounds that said investments were not legal as investments of conservatorship funds. The objections were sustained by the Probate Court, and an order was entered by that Court setting aside, first, all former orders authorizing said investments, and second, the several orders ap-

proving the various reports of the conservator. An appeal was taken to the Circuit Court of Sangamon County, and H. R. Pool, Attorney for the Veterans' Administration, was appointed guardian ad litem for the insane ward, whereupon he adopted the objections of the administrator of veterans' affairs, formerly filed in the Probate Court. The Circuit Court entered an order holding that said Joseph Brothers Lumber Company Bonds were not secured by a first mortgage; that all orders of the Probate Court approving said investments were void; and that the estate of the Ward was entitled to recover from the conservator the sum of thirteen thousand three hundred dollars. The Court further sustained the order of the Probate Court disallowing said investments. The mortgage bonds of Joseph Brothers Lumber Company defaulted in the payment of their interest in 1934.

At common law a conservator has authority to loan the funds of his Ward. Our statute has limited this authority by setting out specific classes of loans the conservator may make, and provides that loans upon real estate shall be secured by a first mortgage or trust deed not to exceed half the value thereof. It further provides that all loans shall be subject to the approval of the Court. Ill. Rev. Stats., Ch. 86, Sec. 18.

One of the principal objections of the guardian ad litem to the investments in question is that the mortgage instrument gives the mortgagor the right to sell the mortgaged premises, or some part thereof, with the consent of the trustee, but without the consent of the bondholders, and to use the proceeds of the balance to redeem outstanding bonds or to purchase or construct additional physical property for the company. He contends that the provision of the trust deed could be so construed as to authorize the mortgagor, with the consent of the trustee, to sell a part of the land and with the proceeds to purchase or construct additional physical property for the mortgagor, and that this provision of the deed would authorize the company to sell part of the land and to purchase different and less valuable land, in lieu thereof, or to construct physical property which would include personal property for the mortgagor to the detriment and loss of the bondholders.

The Statute in question is mandatory in its provisions, and the Probate Court is limited in authorizing only those investments included within the specific language of the Statute. Any order of the Probate

Court not within the intent and meaning of the Statute is absolutely void and of no effect, and provides no protection to the conservator who, in the event of loss, seeks to rely upon the order.

The clear meaning of the language used in the Statute, "loans upon real estate shall be secured by first mortgage or trust deed thereon, and not to exceed half the value thereof" is that the mortgagee shall become possessed of an equitable first lien upon specific land, to secure the payment of the debt, which lien, so to speak, follows the land, and it is clear that the instrument in question which permits release of the specific land without payment of the debt and without consent of mortgagee, and permits a substitution of other property either real or personal does not meet the requirements of the Statute in question.

Where, as in this case, the investment is made in part only of a large number of bonds secured by the same mortgage or trust deed, the individual bondholders must be provided, "under the mortgage instrument" with parity of lien if the mortgage bond is to be regarded as qualifying under the Statute.

> "Where a mortgage secures several notes there is only one lien to secure the entire debt. The statute is directed at the kind and quality of the mortgage. A note which by reason of its earlier maturity has priority over all other notes secured by a first mortgage is as effectually prior to all other liens as if it were the only note secured by the mortgage. If it is on a parity with the other notes, it is none the less secured by a first mortgage unaffected by the ownership of the other notes, and a mortgage which secures a note subject to the priority of earlier maturing notes is not a first mortgage as to that note." In re Lalla's Estate, 362 Ill. 621.

The Statute provides that the loan shall not exceed one-half the value of the land mortgaged as security. Therefore, the Court must look to the value of the specific land mortgaged to assure that it has value equivalent to twice the amount of the loan. This contemplates a continuing lien upon the same specific land, for, if there be power in the mortgagor to substitute, the value of the substituted land may not be twice the amount of the outstanding loan. Hence the Statute requires a continuing mortgage lien upon certain specific land worth twice the amount of the loan.

The contention of appellant that the loans in question were approved by the Probate Court, and that

the current reports showing they were approved by said court was final and afforded protection to the conservator, notwithstanding their failure to meet the requirements of the statute, is not tenable. In the case of In re Lalla's Estate, supra, this same point was raised. There the Kellogg investments were purchased under the authority of prior orders of the Probate Court, and also were recited in the fiduciary's intermediate reports, which were approved by the Court. The Court determined that the notes in the Kellogg case, which were subject to the priority of other notes maturing earlier than those purchased by the guardian, were not first mortgage loans in the sense of the Statute, and the objections to these loans in the Kellogg Estate were sustained, regardless of the fact that the Probate Court had definitely authorized that the investment be made.

The Supreme Court in affirming the Appellate Court in reference to the Kellogg paper stated in its opinion:

> "The remaining notes acquired in the Kellogg case were subject to the priority of other notes maturing earlier than those purchased by the guardian and were not first mortgage loans in the sense of the statute. The acceleration clause in case of default did not affect such priority. The objections to the approval of these loans were correctly sustained."

We, therefore, are of the opinion that the order of the Probate Court which was affirmed by the Circuit Court, was proper, and for the reasons herein stated, we hold that the Order and Judgment of the Circuit Court should be and is hereby affirmed.

*Judgment Affirmed.*

14 (A-19598—14)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On APR 2 6 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9517 Ag. No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D.1940

Lewis H. Armstrong,
Plaintiff, Appellee

vs.

Ben Sharer,
Defendant, Appellant.

Appeal from the Circuit Court of Whiteside County, Illinois.

WOLFE, P.J.

Lewis H. Armstrong brought a suit in the Circuit Court of Whiteside County, Illinois, against the defendant, Ben Sharer, in an action of trespass. The complaint filed consisted of four counts. The first three counts charge that the defendant did break and enter a certain corn crib belonging to the plaintiff, and took therefrom, corn valued at $500.00. The fourth count charges the defendant with wilful and wanton trespass in taking the corn, and asks for damages in the sum of $5,000.00. The defendant filed his answer, which is a general denial of all the allegations set forth in the complaint.

The evidence of the plaintiff shows that he was a tenant on the farm in Rock Island County, Illinois, which was owned and controlled by Miss Cora Von Steenbergh of Indiana. Under the terms of the lease, the owner was to receive one-third of all crops raised upon the farm as rent, including soy beans and sorghum. The soy beans and sorghum raised upon the farm had been sold by the plaintiff, but the proceeds not accounted for to the landlord. The corn had been picked and placed in a double crib. The man who operated the mechanical corn picker testified that as he picked the corn, he would pick six rows for the tenant and four rows for the landlord. The corn was hauled to the crib as picked.

The defendant, Ben Sharer, owns and operates an elevator at Albany, Illinois. He, together with several of his employees,

NOKES, J.A.

Lewis K. Armstrong brought a suit in the Circuit Court of Whiteside County, Illinois, against the defendant, Ben Shaner, in an action of trespass. The complaint filed consisted of four counts. The first three counts charge that the defendant did break and enter a certain corn crib belonging to the plaintiff, and took therefrom, corn valued at $500.00. The fourth count charges the defendant with willful and wanton trespass in taking the corn, and asks for damages in the sum of $3,000.00. The defendant filed his answer, which is a general denial of all the allegations set forth in the complaint.

The evidence of the plaintiff shows that he was a tenant on the farm in Rock Island County, Illinois, which was owned and controlled by Miss Ora Stevenson of Indiana. Under the terms of the lease, the owner was to receive one-third of all crops raised upon the farm as rent, including soy beans and sorghum. The soy beans and sorghum raised upon the farm had been sold by the plaintiff, but the proceeds not accounted for to the landlord. The corn had been picked and placed in a double crib. The corn was operated the mechanical corn picker testified that as he picked the corn, he would pick ears for the feeder and throw the husks into the landlord. The corn was housed in the crib by plaintiff.

The defendant, Ben Shaner, owns and operates an elevator at Albany, Illinois. He, together with several of his employees,

went to the crib in question, and started to shell the corn, but the sheller broke down, and the corn which was shelled was hauled to the elevator. The balance of the corn in the crib, with the exception of thirty or forty bushels, was hauled away by Mr. Sharer. At the time Mr. Sharer took the corn, there was some dispute between Armstrong and Sharer, as to the ownership of it. Armstrong claimed that Sharer had no right to take it, as the corn belonged to him. Mr. Sharer claimed that he had bought the corn from Miss Von Steenbergh. The plaintiff did not claim the corn on the west side of the crib, but admitted that was rent corn, but did claim all of the corn on the east side of the crib.

The defendant called Sylvia Young who said she lived in Frankfort, Indiana. She testified that on November 19, 1938, she went to the farm with Miss Von Steenbergh where Mr. Armstrong was picking corn, and that she heard a conversation between Miss Von Steenbergh and Mr. Armstrong; that they discussed the picking of the corn and Mr. Armstrong said that the best place to sell the corn was to Mr. Ben Sharer; that Miss Von Steenbergh said that she was going to stay until the entire corn crop was picked, shucked and delivered to the elevator; that she and Miss Von Steenbergh, on Thanksgiving Day, went to the home of Mr. Armstrong and had a conversation with him relative to the corn, and Mr. Armstrong said that Miss Von Steenbergh could take eight hundred bushels of corn for her share of the crop, and that Ben Sharer would shell the corn; that Armstrong said that he owed Miss Von Steenbergh for one-third of the sorghum and beans and he would pay Miss Von Steenbergh her one-third with corn; that if there was not eight hundred bushels of corn in one crib, that Mr. Sharer should go to the other crib and take enough to settle on a basis of eight hundred bushels; that Mr. Sharer should go to the west crib first, and if there wasn't enough to make eight hundred bushels, then he should go to the east crib and remove enough of that corn to make a total of eight hundred bushels.

must be the very be sensible, one morning in April the corn, the shellers broke down, and the corn which was shelled was hauled to the elevator. The balance of the corn in the crib, with the exception of thirty or forty bushels, was hauled away by Mr. Hanover. At the time Mr. Hanover took the corn, there was some dispute between Armstrong and Hanover, as to the ownership of it. Armstrong claimed that Hanover had no right to take it, as the corn belonged to him. Mr. Hanover claimed that he had bought the corn from Miss Von Steenbergh. The plaintiff did not claim the corn on the west side of the crib, but admitted that was rent corn, but did claim all of the corn on the east side of the crib.

The defendant called Sylvia Young who said she lived in Frankfort, Indiana. She testified that on November 19, 1922, she went to the farm with Miss Von Steenbergh where Mr. Armstrong was picking corn, and that she heard a conversation between Miss Von Steenbergh and Mr. Armstrong; that they discussed the picking of the corn and Mr. Armstrong said that the best place to sell the corn was to Mr. Ben Hanover; that Miss Von Steenbergh said that she was going to stay until the entire corn crop was picked, shucked and delivered to the elevator; that she and Miss Von Steenbergh, on Thanksgiving Day, went to the home of Mr. Armstrong and had a conversation with him relative to the corn, and Mr. Armstrong said that Miss Von Steenbergh could take eight hundred bushels of corn for her share of the crop, and that Ben Hanover would shell the corn; that Armstrong said that he owed Miss Von Steenbergh for one-third of the shucking and hauling and he would pay Miss Von Steenbergh her total with corn; that if there was not eight hundred bushels of corn in one crib, that Mr. Hanover should go to the other crib and take enough to supply on a total of eight hundred bushels; that Mr. Hanover should go to the west corn crib, and if there wasn't enough to make eight hundred bushels, then he should go to the east crib and pretty enough of that corn to make a total of eight hundred bushels.

Cora Von Steenbergh testified that she lived in Frankfort, Indiana, and owned the farm rented to Mr. Armstrong; that she was on the farm on the 21st of November and had a conversation with Mr. Armstrong; that Mrs. Young was present when she had a conversation with Armstrong in regard to the rent for the place, and Armstrong said that he would settle for eight hundred bushels of corn; that he first said he would settle by dividing and picking the rows and she said that she would only settle by actual bushels; that he was supposed to deliver the corn to the market; that Armstrong said that she was to get eight hundred bushels of corn, and pay for one-third of the crop which should be one-third of the sorghum, one-third of the beans, and her share of the corn and to cover the expense of hauling it to the market; that she said if there wasn't eight hundred bushels of corn on the west side of the crib, that they would take enough out of the east side to make up the eight hundred bushels, and that Mr. Armstrong said that that would be all right; that she then went to Mr. Sharer, sold the corn to him and Mr. Sharer was to go out shell and haul the corn.

Mr. Ben Sharer testified in his own behalf, and stated that he was in the grain, elevator and coal business at Albany, Illinois; that he had known Mr. L. Armstrong for quite a while; that he knew the Von Steenbergh farm, which is about eight miles southwest of Albany; that about Thanksgiving time of 1938, Miss Von Steenbergh came to him and wanted him to go to the farm to get eight hundred bushels of corn; that he bought the corn from her; that she went to the farm with him and showed him where the corn was; that she was there with him on two different occasions; that he went to the place and got the corn which actually weighed six hundred fifty-one bushels; that he paid Miss Von Steenbergh for this corn. He also testified in regard to Mr. Armstrong having a conversation with him regarding the price of the corn when he was getting the corn at the crib; that while they were shelling the corn, the sheller broke, and the last of the corn was taken out in the ear. The evidence shows that there were three hundred twenty-nine bushels of corn in the west crib.

[illegible] Mr. Armstrong, and owned the farm rented to him. Another; that one was on the farm on the death of Lewendorf and was a conversation with Mr. Armstrong; that the. Young was present when she had a conversation with Armstrong in regard to the rent for the place, and Armstrong said that he would rattle for eight hundred bushels of corn; that he first said he would rattle by dividing and placing the rows and she said that she would only rattle by actual bushels; that he was supposed to deliver the corn to the station; that Armstrong said that she was to get eight hundred bushels of corn, and pay for one-third of the crop which should be one-third of the [illegible], one-third of the beans, and one-third of the corn and he agreed the expense of hauling it to the station; that she said if there wasn't eight hundred bushels of corn on the west side of the field, that they would take enough out of the east side to make up the eight hundred bushels, and that Mr. Armstrong said that that would be all right; that she then went to Mr. Shaver, said the corn to him and Mr. Shaver was to go out shell and load the corn.

Mr. Don Shaver testified in his own behalf, and stated that he was in the grain, [illegible] any [illegible] of [illegible], [illegible] that he had known Mr. L. Armstrong for quite a while; that he knew the Von Steenbergh farm, which is about eight miles southeast of [illegible]; that about Thanksgiving time of 1924, Miss Von Steenbergh came to him and wanted him to go to the farm to get eight hundred bushels of corn; that he bought the corn from her; that she went to the farm with him and showed him where the corn was; that she was there with him on two different occasions; that he went to the place and got the corn which actually weighed six hundred fifty-one bushels; that he paid Miss Von Steenbergh for this corn. He also testified in behalf of Mr. Armstrong little a [illegible] the [illegible] the entry of the corn that he was cutting the corn in the shell [illegible] while they were shelling the corn, the shelter broke and the last of the corn was taken out in the car. The evidence shows that there were three hundred twenty-one bushels of corn in the west side.

In rebuttal Mr. Armstrong said that he told Miss Von Steenbergh he would give her one hundred fifty bushels of corn for her share of the sorghum and beans, but denied promising her that he would give her eight hundred bushels of corn. On cross-examination he admitted that Miss Von Steenbergh and Mrs. Young asked him for eight hundred bushels of corn, but he said, "I didn't tell them nothing."

The case was submitted to a jury who found the issues in favor of the plaintiff and assessed his damages at $570.00. Judgment was entered on the verdict and it is from this judgment that the appeal is prosecuted. The question for this Court to decide, "is whether this verdict is supported by the preponderance of the evidence." It has long been the law that a verdict of a jury on a controverted question of fact should be final and binding upon a court of review, unless the verdict is manifestly against the weight of the evidence. From a review of all of the evidence in this case, it is our conclusion that the verdict of the jury is against the manifest weight of the evidence, and that the judgment should not be allowed to stand. The judgment is therefore reversed and the cause remanded.

Reversed and cause remanded.

In rebuttal Mr. Simpkins said that he told Miss Van Rosenburgh he would give her one hundred dollars of each for her share of the morphine and heroin, and denied promising her that he would give her eight hundred dollars of corn. On cross-examination he admitted that Miss Van Rosenburgh was Mrs. Young asked him for eight hundred dollars of corn; he so said, "I didn't that been nothing."

The case was submitted to a jury who found the issues in favor of the plaintiff and assessed his damages at $370.00. Judgment was entered on the verdict and it is from this judgment that the appeal is prosecuted. The question for this court to decide, "Is whether this verdict is supported by the preponderance of the evidence." It has long been the law that a verdict of a jury on a controverted question of fact should be final and binding upon a court of review, unless the verdict is manifestly against the weight of the evidence. Upon a review of all of the evidence in this case, it is our conclusion that the verdict of the jury is against the manifest weight of the evidence, and that the judgment should not be affirmed in whole. The judgment is therefore reversed and the cause remanded.

Reversed and cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On MAY 1 0 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9488 AGENDA NO. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1940

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| THE PEOPLE OF THE STATE OF ILLINOIS, et al, Appellees, vs. HERBERT R. JONES, et al, COLUMBIA CASUALTY COMPANY, et al, Appellant and Co-appellant. | APPEAL FROM THE CIRCUIT COURT OF WILL COUNTY. |

DOVE, J.

At the November election 1930, Herbert R. Jones was elected County Treasurer of Will County for a term beginning December 1, 1930 and ending December 3, 1934. He qualified and on November 15, 1930 entered into a bond as provided by law in the sum of $250,000.00 with nine individuals as sureties. On January 27, 1931 he entered into the required statutory bond as County Collector in the sum of $850,000.00 with eighteen individuals as sureties. On February 22, 1932 he again entered into another bond as county collector in the sum of $755,000.00 with the Columbia Casualty Company as surety. On January 11, 1933 he entered into another bond as collector in the sum of $400,000.00, also with the Columbia Casualty Company as surety.

On August 13, 1936 the People of the State of Illinois acting by and through the State's Attorney of Will County, filed the instant

IN THE

CIRCUIT COURT OF FLORIDA

EIGHTH DIVISION

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February Term, A. D. 1940

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| [illegible] et al., Appellees, vs. CHARLES R. JONES, et al., ALACHUA COUNTY COMMITTEE, et al., Appellant and Co-appellant. | ADDRESS FROM THE SECRETARY OF WELL COUNTY. |

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NOTES: 7.

In the Previous election (1938), Answer 3. Jones was elected County Treasurer of this County for a term ending January 1, 1939 and ending December 3, 1934. He qualified and on November 15, 1938 entered into a bond as provided by law in the sum of $250,000.00 with nine individuals as sureties. On January 27, 1932 he entered into his required statutory bond as County Collector in the sum of $250,000.00 with eighteen individuals as sureties. On February 23, 1932 he again entered into another bond as county collector in the sum of $750,000.00 with the National Surety Company as surety. On January 11, 1933 he entered into another bond as collector in the sum of $500,000.00, also with the Ohio Surety Company as surety.

On August 3, 1933 the Sheriff of the State of Illinois notified by and through the Auditor's Attorney of this County. Until his indent

complaint for an accounting against the said Herbert R. Jones as County Treasurer of Will County and ex-officio county collector and the sureties on his several respective bonds to recover shortages, misapplication of funds and defalcations during his term of office. The complaint consisted of several counts and each prayed for an accounting between the People and the defendants and that a judgment be rendered against such of the defendants for the respective amounts due from each as the account might disclose. Answers, counter-claims and replies were filed and after the issues had been made up the cause was referred to a special master to determine whether an accounting should be had. While the cause was pending before the master a settlement was effected by the provisions of which the Casualty Company as surety paid to the County of Will $110,000.00 and $15,000.00 additional was paid by the individual bondsmen. $69,226.03, being the amount of money tied up in closed banks, was also paid to the County of Will and these several amounts aggregating $194,226.03 were to be distributed among the various 118 taxing bodies lawfully entitled thereto. This settlement was duly approved by an appropriate resolution of the County Board of Supervisors on November 29, 1938 and all the taxing bodies except the Village of Frankfort and the Town of Joliet thereafter passed appropriate resolutions approving the settlement and accepting such distributive share as computed by the County Board and executed receipts therefor. On January 18, 1939 Albert H. Krusemark, as a taxpayer, the said Village of Frankfort and the said Town of Joliet were granted leave to intervene and their intervening petitions were filed on January 20, 1939. On January 27, 1939 Columbia Casualty Company filed its amendment and supplement to its answer setting forth that there had been a final settlement of the case pursuant to the resolution of the County Board of November 29, 1938 and

alleging that distribution had been made and accepted by 116 of the 118 taxing bodies which were entitled to participate in the distribution of said fund. In this amended and supplemental answer it was also alleged that this settlement also provided that the county should receive all dividends paid out by receivers of closed banks of public monies deposited therein and the settlement was made also without prejudice to the rights of the plaintiff to proceed against said Herbert R. Jones personally and averred that the county had executed its release to all sureties on all the bonds of Herbert R. Jones and had acknowledged the receipt of its share of the total amount of cash received by the county as provided in the settlement resolution of the Board of Supervisors. To this amendment and supplement to the Casualty Company's answer the plaintiff filed its reply admitting the allegations as to the settlement. The Village of Frankfort in its reply characterized the settlement as an "attempted" one and neither admitted nor denied the allegations of its amended and supplemental answer. The Town of Joliet filed no reply.

On May 22, 1939 the special master filed his report finding that the defendants were liable to account and recommending that a decree be entered to that effect. To this report objections were filed which were overruled and afterwards renewed as exceptions and upon a hearing had, the chancellor approved the report, overruled all exceptions thereto and on May 22, 1939 re-referred the cause to the special master with instructions to proceed to hear further evidence and to state the account. Thereafter and on June 7, 1939 the chancellor entered an order directing the Casualty Company to pay to the special master $1,793.75 for services rendered by him and to pay to the reporter for his services the sum of $1251.11. To reverse these orders and decrees the Columbia Casualty Company has appealed and most of the individual defendants have joined as co-appellants.

alleging that distribution had been made and accepted by 116 of the 117 taxing bodies which were entitled to participate in the distribution of said fund. In this amended and supplemental answer it was further alleged that this settlement also provided that the county should receive all dividends paid out by receivers of closed banks of public moneys deposited therein and the settlement was made also without prejudice to the rights of the plaintiff to proceed against said Herbert R. Jones personally and averred that the county had executed its release to all sureties on all the bonds of Herbert R. Jones and had acknowledged the receipt of the sums of the total amount of cash received by the county as provided in the settlement resolution of the Board of Supervisors. To this amendment and supplement to the Casualty Company's answer the plaintiff filed its reply admitting the allegations as to the settlement. The Village of Tonnerre in its reply characterized the settlement as an "attempted" and not neither admitted nor denied the allegations of its amended and supplemental answer. The Town of Joliet filed no reply.

On May 22, 1939 the special master filed his report finding that the defendants were liable to account and recommending that a decree be entered by that effect. In this report exceptions were filed which were overruled and otherwise disposed of by the chancellor and upon a hearing had, the chancellor approved the report, overruled all exceptions thereto and on May 24, 1939 rendered his decree in the matter. Thereafter with leave to prepare and file further evidence and be also the account. Thereafter and on June 7, 1939 the chancellor entered an order directing the Casualty Company to pay to the special master $4,731.75 for services rendered by him and to pay to the receiver for his services the sum of $1231.11. To reverse these orders and decrees the Lincoln Casualty Company has appealed and most of the institutional defendants have joined as co-appellants.

The evidence found in this record discloses and the brief filed on behalf of appellee, the sole original plaintiff below, states that a valid settlement of all the issues in this case had been effected and that this settlement, legally effected, is the end of the case. The State's Attorney confesses that the decree of the chancellor is erroneous and should be reversed and suggests that this court find that the sum of $5,737.21 due the Town of Joliet and the sum of $67.67 due the Village of Frankfort be paid by appellant to the present County Treasurer of Will County for and on behalf of these bodies, to be withdrawn by them upon their giving a receipt therefor and that from the dividends of closed banks the additional sum of $27.35 be paid to the Village of Frankfort and the additional sum of $1,783.20 to the Town of Joliet. As to the order of June 7th, 1939 directing the payment by appellant to the special master of his fees and the fees to the reporter the State's Attorney states he is not interested.

After the record and the original briefs had been filed in this court, the order of June 7th, 1939 was complied with and satisfied and on March 9, 1940 this court upon appellant's motion dismissed its appeal so far as the order of June 7, 1939 is concerned and agreeable to the suggestion of the State's Attorney with reference to the $5,737.21 due the Town of Joliet and the $67.67 due the Village of Frankfort under the terms of the settlement, appellant did, on March 9, 1940, pay those sums to the present county treasurer for the benefit of these two taxing bodies to be withdrawn by them upon demand and upon giving proper receipts therefor. This was done with the express approval of appellee as shown by the stipulation of the parties hereto, together with the supplemental abstract of record.

The intervenors Village of Frankfort, Albert H. Krusemark and Town of Joliet have not followed this appeal, have not entered any appearances in this court or filed any briefs. The only appellee not

in default confesses that the decree appealed from should be reversed. The only two taxing bodies interested which were not expressly satisfied with the settlement and which had not accepted the benefits thereof have acquiesced therein by failing to follow the appeal to this court. Evidently there is no desire on the part of anyone to further engage in this litigation and as stated by counsel for all the parties appearing in this court, there is no occasion for further proceedings in this case. The order and decree of May 22, 1939 as against everyone to this record other than Herbert N. Jones is therefore reversed.

DECREE REVERSED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

(73947) 7

9511

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9511 AGENDA NO. 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1940.

| | |
|---|---|
| JESSE P. HAYDEN, Appellee, vs. FRED H. BREDEMEIER and ELSIE BREDEMEIER, Appellants. | APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY. |

DOVE, J.

On December 21st, 1937 Jesse P. Hayden filed his complaint and cognovit in the Circuit Court of Kankakee County and recovered a judgment by confession that day against the defendants Fred H. Bredemeier and Elsie Bredemeier for $2655.00. Thereafter and on January 3rd, 1938 the defendants filed their motion supported by the affidavits of the defendants to open up the judgment and for leave to plead. These affidavits were, on motion of the plaintiff, stricken. Subsequently, by leave of court, an amended affidavit was filed to which was attached a copy of an instrument signed by the plaintiff and dated July 23, 1934 and addressed to John Krueger, Secretary-Treasurer of the Federal Land Bank and to the Land Bank Commissioner of St. Louis, hereinafter referred to. The trial court again sustained the motion of the plaintiff to strike the affidavit as amended, denied the motion of the defendants to open up the judgment and for leave to plead and directed that the judgment rendered on December 21, 1937 stand in full force and effect. From these orders the defendants have perfected this appeal.

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IN THE

CIRCUIT COURT OF MARION

[illegible]

February Term, A.D. 1937.

---

Case 7. [illegible]

Vs.

Case 8. [illegible]

Appellants.

[illegible] THE [illegible] COURT

OF MARION COUNTY.

---

[illegible] 1.

On December 21st, 1937 Cases 7. [illegible] filed his complaint and judgment in the Circuit Court of Marion County and received a judgment by confession that day against the defendants Fred H. Breckenridge and Hilda Breckenridge for $2555.70. Thereafter and on January 3rd, 1938 the defendants filed their motion supported by the affidavits of the defendants to open up the judgment and to leave to plead. These affidavits were, on motion of the plaintiff, stricken. Subsequently, by leave of court, an amended affidavit was filed to which was attached a copy of an instrument signed by the plaintiff and dated July 23, 1934 and addressed to John Kruger, Secretary-Treasurer of the Federal Land Bank and to the Land Bank Commissioner of St. Louis, Missouri, stating in. The trial court again sustained the motion of the plaintiff to strike the affidavit as amended, denied the motion of the defendants to open up the judgment and for leave to plead and directed that the judgment rendered on December 21, 1937 stand in full force and effect. From these orders the defendants have perfected this appeal.

The amended affidavit of the defendant Fred H. Bredemeier states that on or about June 16, 1934 the defendants were indebted to the plaintiff in the sum of $20,410.00 and accrued interest; that at that time they were also indebted to John Heldt in the sum of $1,000.00 and to F. J. Cloidt in the sum of $2100.00; that in the Spring of 1934 at the request of the plaintiff the defendants applied to The Federal Land Bank of St. Louis and to the Land Bank Commissioner for loans to be secured by mortgages on certain real estate owned by the defendants; that loans were granted the defendants aggregating $15,700.00; that on July 23, 1934 each of the said creditors of the defendants, including the plaintiff, agreed to scale down the indebtedness due them from the defendants and accept a smaller sum in full satisfaction of their claims against the defendants; that John Heldt agreed to accept $800.00 in full satisfaction of defendants' indebtedness to him; that said F. J. Cloidt agreed to accept the sum of $1800.00 in full satisfaction of defendants' indebtedness to him and the plaintiff agreed to accept in full satisfaction of defendants' indebtedness to him the sum of $12,500.00 on or before August 1, 1934, or if paid thereafter to accept said sum of $12,500.00 together with 6% interest thereon from August 1, 1934 to the date of payment. The affidavit then states that the plaintiff agreed that when said sum of $12,500.00 and 6% interest from August 1st, 1934 was paid to him that all his claims against the defendants would be paid and satisfied in full. The affidavit then recites that thereafter said loans were obtained from The Federal Land Bank and the Land Bank Commissioner and that each of said creditors, including the plaintiff, was paid the respective amounts so agreed by them to be received by them in full satisfaction of their respective claims against the defendants;

The amended affidavit of the defendant Fred L. Hredemeier states that on or about June 16, 1934 the defendants were indebted to the plaintiff in the sum of $20,120.00 and accrued interest; that at that time they were also indebted to John Haldt in the sum of $1,000.00 and to T. T. Cladet in the sum of $2100.00; that in the spring of 1934 at the request of the plaintiff the defendants applied to The Federal Land Bank of St. Louis and to the Land Bank Commissioner for loans to be secured by mortgages on certain real estate owned by the defendants; that loans were granted the defendants aggregating $19,700.00; that on July 23, 1934 each of the said creditors of the defendants, including the plaintiff, agreed to settle down the indebtedness due them from the defendants and accept a smaller sum in full satisfaction of their claims against the defendants; that John Haldt agreed to accept $800.00 in full satisfaction of defendants' indebtedness to him; that said T. T. Cladet agreed to accept the sum of $1800.00 in full satisfaction of defendants' indebtedness to him and the plaintiff agreed to accept in full satisfaction of defendants' indebtedness to him the sum of $12,500.00 on or before August 1, 1934, or if paid thereafter to accept said sum of $12,500.00 together with 6% interest thereon from August 1, 1934 to the date of payment. The affidavit then states that the plaintiff agreed that when said sum of $12,500.00 and 6% interest from August 1st, 1934 was paid to him that all his claims against the defendants would be paid and satisfied in full. The affidavit then recites that thereafter said loans were refinanced from The Federal Land Bank and the Land Bank Commissioner and that each of said creditors, including the plaintiff, was paid the respective amounts so agreed by them to be received by them in full satisfaction of their respective claims against the defendants;

that at no time between July 23, 1934 and August 15, 1934, the date of said alleged note which forms the basis of this suit, did the defendants or either of them receive any money or any other thing of value from the plaintiff; that the note sued upon is wholly without any good or valuable consideration; that the plaintiff, on August 15, 1934, the alleged date of the alleged execution and delivery of said note, did not part with any consideration or anything of value and that neither of the defendants received any consideration of any kind or anything of value on account of the alleged execution and delivery of said note and that no one for them or for either of them received any such consideration; that each of the foregoing statements is true in substance and in fact; that each statement is made on the personal knowledge of affiant and that if sworn as a witness in this case affiant can so testify. The instrument dated July 23, 1934, above referred to, the authenticity of which is verified by the affidavit of the defendant Fred H. Bredemeier is as follows:

"CREDITOR'S STATEMENT OF INDEBTEDNESS AND
AUTHORITY FOR PAYMENT.

Application No. 107679 N. F. L. A. or L. C. No.
Applicant Fred Bredemeier

To Jesse B. Hayden Momence, Illinois, July 23rd, 1934
Momence, Illinois

"You hold a mortgage as an obligation of Fred Bredemeier, Momence, Ill. for $17,000.00. Kindly state below
3,410.00
the earliest date said indebtedness can be paid, giving the amount which you will accept in full satisfaction of the same on or before said date, or thereafter, and return this statement to me.

(Signed)
Secretary-Treasurer or
Loan Correspondent.

To John Krueger
Secretary-Treasurer or Loan Correspondent and to the Federal Land Bank of St. Louis and/or Land Bank Commissioner.

Date July 23rd, 1934

"The amount of the indebtedness referred to above is 17,000.00 / 3,410.00 as unpaid principal and $836.03 / 306.90 unpaid interest up to the 16th day of June, 1934, upon which date or after which date said debt can be paid. Said

that at no time between July 23, 1934 and August 15, 1934, the date of said alleged note which forms the basis of this suit, did the defendants or either of them receive any money or any other thing of value from the plaintiff; that the note sued upon is wholly without any good or valuable consideration; that the plaintiff, on August 15, 1934, the alleged date of the alleged execution and delivery of said note, did not have with any institution or anything of value and that neither of the defendants received any valuable or any thing of value on account of the alleged execution and delivery of said note and that no one for them or for either of them received any such consideration; that each of the foregoing statements is true in substance and in fact; that each statement is made on the personal knowledge of affiant and that if sworn as a witness in this case affiant can do so readily. The instrument dated July 23, 1934, above referred to, the authenticity of which is verified by the affidavit of the defendant Fred H. Wredemeier is as follows:

"CONSTABLE'S INSTRUMENT OF INDEBTEDNESS AND
AUTHORITY FOR JUDGMENT.

R. T. L. A. of L. G. Co.
Minneapolis Fred Wredemeier

To Jesse F. Cogdon Constable, Minneapolis, Hennepin County, Minnesota

"For hold a mortgage as an obligation of Fred Wredemeier, Minnesota, XIII. For $17,000.00. Hereby state below $3,410.00

the amount for which you may enter judgment against me in favor of the payee on or before said date, or thereafter, and return this statement to me.

(Signed)
Wredemeier-Insurance or
Lum & Wredemeier.

To John Brewer
Wredemeier-Insurance or Lum Wredemeier. Date July 23rd, 1934
Presentation not to the Payee
and then to the Smith and/or
and then presentment.

"The amount of the indebtedness referred to above is $17,000.00 as unpaid principal and $390.03 unpaid interest. 304.00

indebtedness is evidenced by a mortgage due on the 1st day of March, 1944. The debt is secured by a real estate mortgage which is recorded in book 377 page 335 of the records
400 157
of Kankakee County, State of Illinois. Upon payment to the undersigned of $12,500.00 on or before the 1st day of August, 1934, or if paid thereafter, by including interest at the rate of 6 per centum per annum on $12,500.00 from said date to the date of payment said sum will be accepted in full satisfaction of this claim.

"In connection with any loan or loans that may be made by the Federal Land Bank of St. Louis and/or the Land Bank Commissioner to the above-named applicant, it is further agreed that said sum may be paid in Federal Farm Mortgage Corporation bonds of the last issue preceding the date the proceeds of the loan are disbursed, fully and unconditionally guaranteed both as to principal and interest by the United States. It is understood that such bonds will be accepted in payment at their face value with any necessary adjustments for interest accrued to the date of payment. It is also understood that such bonds are issued in denominations of not less than $100.00 and that any necessary adjustments between the amount of this claim and the nearest amount it is possible to disburse in bonds on the basis of par plus accrued interest will be paid in cash by the Bank.

"The undersigned creditor further agrees that directly or indirectly no note, mortgage or other consideration will be received from the debtor, incident to such acceptance, other than the consideration paid by The Federal Land Bank and/or the Land Bank Commissioner, and that when said consideration is paid all claims of this creditor against the above-named debtor will have been satisfied in full. No person, firm or corporation other than the undersigned is the owner of any interest in said indebtedness.

"All papers evidencing this indebtedness, properly cancelled, and with proper release, will be delivered to the Federal Land Bank of St. Louis and/or the Land Bank Commissioner in exchange for a copy of Order for Shipment of Bonds, and a check of the Federal Land Bank of St. Louis in payment of any necessary adjustment, according to the terms stated.

"Said bonds should be shipped for delivery to and for the account of the undersigned, to Parish Bank & Trust Company, Momence, Illinois, which is hereby designated as the agent of the undersigned to accept delivery for it and on its behalf.

(Signed) Jesse B. Hayden"

It will be noted that the amended affidavit in support of the motion to open up this judgment does not state when, where or under what circumstances the note which forms the basis of this suit was executed. Nor does the affidavit make any reference

indebtedness is evidenced by a mortgage dated on the 1st day of March, 1924. The debt is secured by a real estate mortgage which is recorded in book 377 page 235 of the records of Madison County, State of Illinois. Upon payment to the undersigned of $12,500.00 on or before the 1st day of March, 1924, or if paid thereafter, by including interest at the rate of 6 per centum per annum on $12,500.00 from said date to the date of payment said sum will be accepted in full satisfaction of this claim.

"In connection with any loan or loans that may be made by the Federal Land Bank of St. Louis and/or the Land Bank Commissioner to the above-named applicant, it is further agreed that said sum may be paid in Federal Farm Mortgage Conversion bonds of the Land Bank presently the date the proceeds of the loan are disbursed, fully and unconditionally guaranteed both as to principal and interest by the United States. It is understood that such bonds will be accepted in payment at their face value with any necessary adjustments for interest accrued to the date of payment. It is also understood that such bonds are issued in denominations of not less than $100.00 and that any necessary adjustments between the amount of this claim and the nearest amount in is possible to distribute in bonds on the basis of per plus accrued interest will be paid in cash by the Bank.

"The undersigned further agrees that directly or indirectly no note, mortgage or other consideration will be received from the debtor, incident to such acceptance, other than the conversion bonds by the Federal Land Bank and/or the Land Bank Commissioner, and that when said conversion is paid all claims of this creditor against the above-named debtor will have been satisfied in full. No person, firm or corporation other than the undersigned is the owner of any interest in said indebtedness.

"All papers evidencing said indebtedness, properly cancelled, and with proper release, will be delivered to the Federal Land Bank of St. Louis and/or the Land Bank Commissioner in exchange for a copy of order for shipment of bonds, or in case if the Federal Land Bank of St. Louis or agent of our creditor adjustment, according to the terms hereof.

"This bonus shall be valid for acceptance by and for the account of the undersigned, to Farmers Bank & Trust Company, Granite, Illinois, which is hereby designated as the agent of the undersigned to accept delivery for it and on its behalf.

(Signed) Jesse H. Hayden"

It will be noted that the amended affidavit in support of the motion to open up this judgment does not state even, even so much as what circumstances the note which forms the basis of this suit was executed. Nor does the affidavit make any reference

to the note as having been executed by the defendants to the plaintiff as evidence of any part of their original indebtedness to him. It does not appear from anything stated in the amended affidavit that the note sued on has any connection whatever with the indebtedness referred to in the instrument of July 23, 1934 executed by appellee and directed to The Federal Land Bank and the Land Bank Commissioner. What does appear from the affidavit is that the defendants on June 16, 1934 owed the plaintiff $20,410.00 and interest, that the plaintiff thereafter and on July 23, 1934 agreed to scale this indebtedness down to $12,500.00 and accept this sum in full satisfaction of defendants' indebtedness to him, and that this sum of $12,500.00 was paid to the plaintiff in accordance with that agreement. The affidavit then states that at no time between July 23, 1934, and August 15, 1934, the date of the note which forms the basis of this suit, did either of the defendants receive any consideration or anything of value from the plaintiff, nor did anyone for them or either of them receive anything or any consideration from the plaintiff on account of the execution of the note upon which the suit is brought.

In Parent Mfg. Co. v. Oil Products Co., 246 Ill. App. 222 there was a motion made to set aside a judgment by confession and grant the defendant an opportunity to plead. The affidavit stated that no consideration in law or in fact was given for the notes upon which judgment had been taken and that there was an absence of consideration and the court held the affidavit insufficient because it did not state any facts but only conclusions of the pleader. In the instant case there is nothing stated in the affidavit to the effect that the note sued on had any connection

to the note as having been executed by the defendants to the plaintiff as evidence of any part of their original indebtedness to him. It does not appear from anything stated in the amended affidavit that the note sued on has any connection whatever with the indebtedness referred to in the instrument of July 23, 1934 executed by appellee and directors to the Federal Land Bank and the Land Bank Commissioner. Nor does appear from the affidavit that the defendants on June 16, 1934 owed the plaintiff $16,110.00 and interest, that the plaintiff therefore and on July 23, 1934 agreed to apply this indebtedness down to $12,500.00 and accept this sum in full satisfaction of defendants' indebtedness to him, and that this sum of $12,500.00 was paid to the plaintiff in accordance with said agreement. The affidavit then states that it was taken from the 17, 18, and there is, in 1934, the date of the note which forms the basis of this suit. Nil either of the defendants receive any consideration or anything of value from the plaintiff, nor did anyone for them or either of them receive anything of any consideration from the plaintiff on account of the execution of the note upon which the suit is brought.

In Harvey Mfg. Co. v. Oil Products Co., 142 Ill. App. 222 there was a motion made to set aside a judgment for rendering and issue the information on plaintiff's plea. The affidavit stated that on application to let it be that was given for the note upon which judgment had been taken and that there was no absence of consideration and the court held the affidavit insufficient because it did not state any facts but only conclusions of the pleader. In the instant case there is nothing stated in the affidavit to the effect that the note sued on had any connection

whatever with the indebtedness referred to in the instrument dated July 23, 1934. If the note sued on did have any connection with that indebtedness it was certainly incumbent upon the defendant or one of them to set forth that fact and to set forth the circumstances under which they executed this note and how it happened to come into the hands of the plaintiff and how and why it was signed and delivered to the plaintiff, and if it had any connection with the instrument of July 23, 1934 or the indebtedness therein mentioned of the defendants to the plaintiff, those facts should appear. This was not done. The only facts that are stated are in connection with the indebtedness of the defendants to the plaintiff as set forth in the instrument of July 23, 1934. Eliminating those facts, inasmuch as they are not shown to have any connection with the execution of the note sued on, there remains nothing but conclusions of the pleader. In our opinion the trial court did not err in holding the amended affidavit insufficient.

Appellee has assigned as a cross error the action of the trial court in permitting appellants to amend their motion by filing a copy of the instrument of July 23, 1934. The court permitted this to be done upon the same day appellants' motion to open up the judgment was heard by the trial court. The record discloses, however, that the amendment was made by leave of court and under our liberal statute on amendments, the trial court did not err in permitting this amendment to be made. The orders appealed from will be affirmed.

ORDERS AFFIRMED.

whatever with the indebtedness referred to in the instrument dated July 23, 1924. If the note sued on did have any connection with that indebtedness it was certainly incumbent upon the defendant or one of them to set forth that fact and to set forth the circumstances under which they asserted this note did not in fact represent the same into the hands of the plaintiff and how and why it was signed and delivered to the plaintiff, and if it had any connection with the instrument of July 23, 1924, or the indebtedness therein mentioned or the defendants to the plaintiff, those facts should appear. This was not done. The only facts that appeared are in connection with the indebtedness of the defendants to the plaintiff as set forth in the instrument of July 23, 1924. Eliminating those facts, however as they are not shown to have any connection with the execution of the note sued on, there remains nothing but conclusions of the pleader. In our opinion the trial court did not err in holding the amended petition insufficient.

Appellee has stipulated as a cross error the action of the trial court in permitting appellants to amend their motion by filing a copy of the instrument of July 23, 1924. The court permitted this to be done upon the same day appellants' motion to open up the judgment was heard by the trial court. The record discloses, however, that the amendment was made by leave of court and under our liberal statute on amendments, the trial court did not err in permitting this amendment to be made. The cross error complained of will be dismissed.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEITER, Sheriff



---

BE IT REMEMBERED, that afterwards, to-wit: On MAY the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9518 AGENDA NO. 11

IN THE

APPELLATE COURT OF ILLINOIS

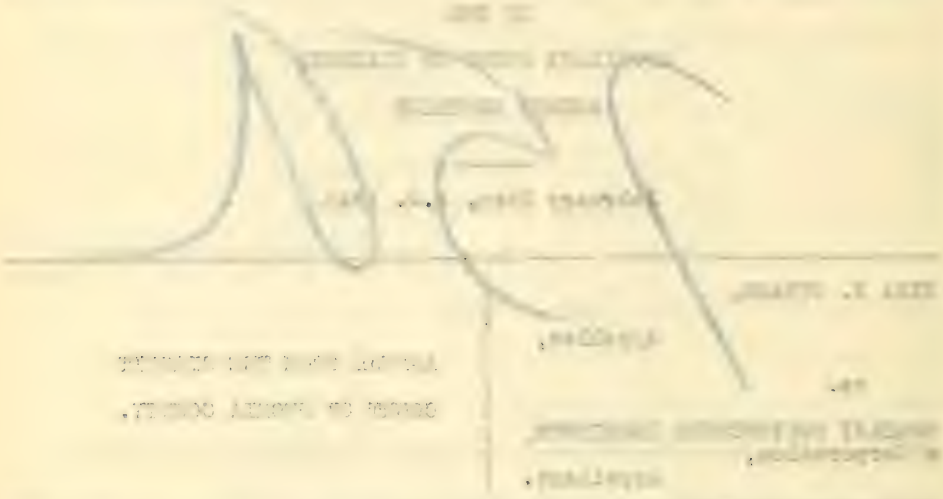
SECOND DISTRICT

February Term, A.D. 1940.

| | |
|---|---|
| RISA E. STRAWN, Appellee, vs. BRADLEY POLYTECHNIC INSTITUTE, a Corporation, Appellant. | APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY. |

DOVE, J.

At the time of his death in July, 1936 and for several years prior thereto, George R. MacClyment was treasurer of Bradley Polytechnic Institute located in Peoria and as such ex officio business manager of the Institute and business officer and secretary of its board of trustees. By its charter and by-laws it was his duty to see that all the rules and regulations prescribed by the board for the government of the business affairs of the Institute were faithfully observed and among his other duties he was required to take the initiative in seeking investments for its funds and was responsible for the faithful execution of all contracts made with the Institute. The by-laws also provided that he should collect and receive all fees and moneys from any source due to the Institute, make a permanent record thereof and deposit the same in an appropriate bank account and was required to exercise general supervision over all acts of all officers and employees having to do with



NOTE, 3.

At the time of his death in July, 1891 and for several years prior thereto, George A. MacIlvaney was treasurer of Trinity Institute located in Boston and as such or office business manager of the Institute and business affairs and secretary of its board of trustees. By its charter and by-laws it was his duty to see that all the rules and regulations prescribed by the board for the management of the business affairs of the Institute were faithfully observed and among his other duties he was required to take the initiative in making investments for its funds and was responsible for the faithful execution of all contracts made with the Institute. The by-laws also provided that he should collect and receive all fees and income from any source due to the Institute, make a permanent record thereof and deposit the same in an approved bank account and was required by absolute personal supervision over all acts of all officers and employees having to do with

the receipt or disbursement of funds and securities of the Institute and to examine all claims against the Institute and no money could be drawn unless the amount had been adjusted and settled by him. The by-laws also required him as secretary and business manager to give a bond in favor of the trustees for the faithful performance of his duties in the sum of at least $40,000.00, the premium therefor to be paid by the Institute.

On January 10, 1929 Risa E. Strawn was the owner of a small farm in Peoria County, where she and her husband lived, and on that day they executed and delivered to the Bradley Polytechnic Institute their promissory note for $3,000.00 due five years after date with 6% interest, payable semi-annually, and secured its payment by executing a mortgage upon said premises. On February 3, 1934 Risa E. Strawn paid $500.00 upon the principal sum and on January 14, 1935, $37.06 was paid so that according to the records of the Institute there was due on July 24, 1935 principal and interest the sum of $2617.31. Prior to this time Mr. MacClyment, acting for and on behalf of said Institute, made several trips to the home of Mrs. Strawn and urged her to pay the amount due and advised her that if it was not paid foreclosure proceedings would be instituted. In addition to the mortgage held by the Institute, there was a second mortgage upon the Strawn premises held by a Mrs. Blair. Mr. Mac Clyment knew of this fact and he contacted Mrs. Anna Westlake, an elderly lady, whose husband, before his death, had been a member of the faculty of the Institute. Mr. MacClyment informed her that the Institute held a small loan and that the borrower wanted more money and upon his representations to her she gave him, on July 2, 1935, her check for $5,002.00, the check indicating that $5000.00 was for

the Strawn loan and the additional $2.00 for another purpose. A short time thereafter Mr. MacClyment advised Mrs. Strawn that he had procured someone who was willing to loan upon her premises a sufficient amount to pay off both the first and second mortgages and requested her to meet him at his office in the Institute on July 24, 1935 and execute a new note and mortgage and that at that time the mortgages then on her property would be released. On July 24, 1935 Risa E. Strawn, accompanied by her son John E. Strawn and his wife Maude E. Strawn, went to the office of Mac Clyment in the Institute office building and while there they executed their note for $5,025.00, payable to the order of John R. MacClyment, Trustee, said sum payable in installments the final installment falling due on July 24, 1940. To secure the payment of this note they executed their trust deed, by which they mortgaged and warranted the premises to George R. MacClyment, Trustee, and also executed and delivered to him an assignment of a certificate evidencing that Mrs. Strawn had a one-sixth interest in what was known as the Scovell and Gelke Trust. In return for these instruments, MacClyment delivered to the Strawns a release of the Blair second mortgage and in answer to their request for the release of the Institute mortgage, MacClyment stated that he was busy but that he would execute a release within the next day or so and would bring it to their home or telephone them to come in and get it. MacClyment further stated that the proceeds of the new note were more than sufficient to discharge the principal and accrued interest upon the Institute and Blair mortgages and that there would be a small amount left, which he would either pay the Strawns in cahh or apply it upon the interest due at the end of the first year. Shortly thereafter MacClyment delivered to Anna

the Women Loan and the additional $4,000 for monthly payments.

A short time thereafter Mr. MacDyment advised Mrs. Brown that he had promised someone who was willing to loan him the money a sufficient amount to pay off both the first and second mortgages and requested her to meet him at his office in the Institute on July 14, 1938 and execute a new note and mortgage and that at that time the mortgages then on her property would be released. On July 14, 1938 Mrs. B. Brown, accompanied by her son Mr. B. Brown and his wife Linda A. Brown, went to the office of Mr. MacDyment in the Institute office building and while there they executed their note for $5,625.00, payable to the order of John K. MacDyment, Trustee, said note provided in substitution the final installment falling due on July 14, 1940. To secure the payment of this note they granted their home, by which they mortgaged and mortgaged the premises to George T. MacDyment, Trustee, and also pledged and delivered to him an assignment of a specified stipulation that Mrs. Brown had a residual interest in what was known as the Sorrell and Collins Trust. In return for these instruments, MacDyment delivered to Mrs. Brown a release of the Mintz second mortgage and in answer to their request for the release of the Institute mortgage, MacDyment stated that he was sorry but that he would execute a release within the next day or so and would bring it to their home or telephone them to come in and get it. MacDyment further stated that the proceeds of the note were more than sufficient to discharge the principal and accrued interest upon the Institute and Mintz mortgages and that there would be a small amount left, which he would deliver to the Browns in cash or apply it upon the interest due at the end of the first year. Shortly thereafter MacDyment delivered to Mrs.

Westlake said note for $5,025.00 and the trust deed securing the same, together with the said certificate evidencing the interest of Mrs. Strawn in the Scovell and Gelke trust. On August 6, 1935 this trust deed was filed for record and MacClyment, upon the stationery of the Bradley Polytechnic Institute wrote Mrs. Westlake, advising her that the note which she held was a first mortgage note secured by a first lien upon the premises of Risa E. Strawn. Thereafter John E. Strawn called at the office of MacClyment several times for the purpose of procuring the note and mortgage held by the Institute and the release of the same, but MacClyment made various excuses. On November 18, 1935 on the letterhead of the Institute, MacClyment wrote and delivered to John E. Strawn the following:

"BRADLEY POLYTECHNIC INSTITUTE

PEORIA, ILLINOIS

November 18th, 1935.

Office of the Business Manager.

Mrs. Risa E. Strawn,
Hanna City, Illinois.

Dear Mrs. Strawn:-

My association with your mortgage matter was to assist you in the refinancing of the first and second mortgages for which your Hanna City, Ill. property was secured prior to July 24, 1935.

July 24th, 1935 a mortgage was given to me as Trustee in the amount of $5025.00. It was payable in nine consecutive semi-annual installments of $125. each beginning April 24, 1936, and the remainder payable July 24, 1940. Privilege given to pay all or any portion prior to due dates. Interest at the rate of 5½% per annum, payable semi-annually, the first installment being due Jan. 24, 1936.

[illegible] said note for $5,000.00 and the trust deed securing the same, together with the said certificate evidencing the interest of Mr. [illegible] in the Sorrell and Sons trust. On August 6, 1932 this trust deed was filed for record and identified, upon the statement of the Fidelity Safeteeghty Insurance Co. Incorporated, stating for that the note which the said was a first mortgage note secured by a first lien upon the premises of Alex K. Stearns. Thereafter John K. Stearns called to the office of [illegible] several times for the purpose of presenting the note for payment but by the Institute and the release of the trust, [illegible] made [illegible] reason. On November 18, 1933 on the [illegible] of the [illegible], [illegible] were and delivered to John K. Stearns the following:

"Sheet [illegible] Corporation

PEORIA, ILLINOIS

November 16th, 1932.

[illegible] of the Business Property.

Mr. John K. Stearns,
Peoria [illegible].

Dear Sir, Friend:-

In connection with your mortgage matter was to assist you in the refinancing of the first and second mortgage for which your Peoria Office, Ill. property was pledged prior to July 24, 1932.

July 24th, 1932 a mortgage was given to [illegible] on Peoria in the amount of $3025.00. It was payable in also consecutive semi-annual installments of $[illegible]. Each [illegible] [illegible], and the [illegible] payable July [illegible]. [illegible] plan is not all or any [illegible] to the [illegible] [illegible] on the [illegible] of the [illegible] [illegible], the [illegible] [illegible] the [illegible], 1932.

The security is the home property at Hanna City and the assigned trust certificate for the one-sixth-interest in the 263 acres of Iowa land. The Trustee to pay direct to me for your account, dividends from the Iowa land. This we hoped to be sufficient for interest and principal payments.

The $5025.00 mortgage was given to first repay the second mortgage of Mrs. Blair, which was surely pressing at that time. Also taxes and loan expense. As early as convenient for funds, the Bradley loan in the amount of $2500 to be repaid, and the $5025 mortgage to then become a first and only mortgage, secured by property stated, and payable under conditions set out. The $2500. loan to Bradley to be payable from funds to be received under the $5025 mortgage under date of July 24th last. And your responsibility for the Bradley loan ceased both as to interest and principal as of July 24, 1935, and your sole responsibility is under the $5025 mortgage bearing interest at 5½ per annum and payable as stated.

We have hoped that the matter could be entirely completed before this. All taxes, insurance premiums, abstracting and recording and loan expense, and interest account Bradley loan were cared for at the same time as the mortgage to Mrs. Blair was paid. The latter was cancelled, released and the cancelled papers returned to you.

Very truly yours,

G. R. MacClyment "

On September 10, 1937 Risa S. Strawn filed the instant complaint in the circuit court of Peoria County making the Institute a party defendant and praying for an order directing it to deliver to the plaintiff ~~and~~ the note and mortgage which it held and that it be decreed to release the mortgage of record. By its amended answer the Institute stated that prior to July 24, 1935 George R. MacClyment ascertained from the plaintiff that she required a mortgage loan to refinance the property upon which the Institute had a mortgage, that MacClyment informed her that he could secure the money for her, that he did so secure it from Anna Westlake and

The security is the home property in Sioux City and the disclosed trust certificate. The six-month-interest is the 3rd mortgage of Dan Clair. The trustee is not insured prior to your account, dividends from the Iowa Fund. This is hoped to be sufficient for interest and principal payments.

The $2025.00 mortgage was given in first years the second mortgage of Mr. Clair, which was merely pending at that time. Due time and loan expires. The credit is extension for years, the holding same for all amount of $200 of be repaid, and the first mortgage is then become a first and only mortgage, secured by property owned, and supplies under conditions not out. The $200. loan is handed to be payable first funds to be received under the first mortgage under date of July 25th last. and your responsibility for the Monday loan interest as to interest and principal as of July 24, 1935, and your note responsibility is under the first mortgage having interest at 5% per annum and payable as stated.

We have hoped that the matter could be entirely completed before this. All taxes, insurance premiums, abstracting and recording and loan expense, and interest accrued. Monday loan were paid for at the same time as the mortgage to Mr. Blair was paid. The letter was satisfied, released and the amount of payment returned to you.

Very truly yours,

H. T. McCullough

"

In September 20, 1937 Dan E. Stevens filed the Bankruptcy petition in the United States of Iowa County making the Bankruptcy a party defendant and praying for an order directing it to deliver to the plaintiff and the note and mortgage which it held and that it be decreed to release the mortgage of record. By its amended answer the Bankruptcy stated that prior to July 24, 1937 Dwayne E. McCullough representing the plaintiff had the required a mortgage loan to refinance the property upon which the Institute had a mortgage, that McCullough informed her that he could secure the money for her, that he did so secure it from Anna Westlake and

in exchange for the sum of $5025.00 MacClyment delivered the Strawn note of $5025.00 and the trust deed securing the same to Anna Westlake, that MacClyment did not pay the Institute the amount due it from the proceeds of the loan made by Mrs. Strawn, and that it cannot ascertain what he did with the amount Mac Clyment received which was due the Institute upon its note and mortgage. Upon the motion of the Institute Anna Westlake was made a party defendant and the Institute filed a cross-complaint against her in which it alleged that George A. MacClyment was the agent of Anna Westlake for the purpose of investing for her the sum of $5025.00, that Anna Westlake delivered to him said amount and she instructed him to procure for her a first mortgage lien upon the premises involved in this proceeding, that contrary to her instructions MacClyment did not apply any portion of the money received from Anna Westlake in payment of the mortgage indebtedness to the Institute. The prayer of the cross-complaint was that a decree be entered finding that MacClyment, at the time of the transactions, was acting for and as agent of Anna Westlake and that the mortgage held by her be decreed to be inferior and subordinate to the lien of the mortgage held by the Institute.

In her answer to the cross-complaint Anna Westlake denied that MacClyment was the agent of Risa E. Strawn but avers that he was the general agent of the Institute in loaning its money and collecting principal and interest due it. She alleged that she gave MacClyment $5025.00 for the purpose of satisfying the Strawn mortgages, which were held by the Institute and by Mrs. Blair and she charged that MacClyment received the money from her as the authorized agent of the Institute and that payment to

In exchange for the sum of $[illegible].00 McCullough delivered the Steyer note of $[illegible].00 and the Grant deed covering the same to Anna Mendiola, but McCullough did not pay the Institute the amount due it from the proceeds of the loan made by Mrs. Grimm, and that it cannot ascertain what he did with the money. The Grimmt receipt which was due the Institute upon its note and mortgage. Upon the motion of the Institute some testimony was made a part of evidence and the Institute filed a cross-complaint against Mrs. Grimm in which it alleged that George A. McCullough was the agent of Anna Mendiola for the purpose of borrowing for her the sum of $[illegible], that Anna Mendiola delivered to him said amount and she instructed him to procure the Mrs. Grimm mortgage lien upon the premises involved in this proceeding, that contrary to her instructions McCullough did not apply any portion of the money received from Anna Mendiola in payment of the mortgage indebtedness to the Institute. The gravamen of the cross-complaint was that a trust be adjudged finding that McCullough, at the time of the transactions, was acting for and as agent of Anna Mendiola and that his mortgage lien in her be declared to be inferior and subordinate to the lien of the mortgage held by the Institute.

In her answer to the cross-complaint Anna Mendiola denied that McCullough was the agent of Mrs. A. Grimm but avers that he was the general agent of the Institute in loaning the money and collecting principal and interest due it. She alleged that she gave McCullough $[illegible].00 for the purpose of satisfying the Grimm mortgage, which was held by the Institute and by Mrs. Grimm and she alleged that McCullough invested the money for her as the authorized agent of the Institute and kept payment to

him operated as a payment of the Strawn note and mortgage which the Institute held. After the issues were made up the cause was referred to the Master, who took the evidence and reported the same, together with his conclusions, to the chancellor. The master found that in this transaction MacClyment was acting as sole business manager of the Institute, that in procuring the sum of $5025.00 from Anna Westlake, MacClyment was to pay the Strawn indebtedness to the Institute and that said indebtedness was in fact paid to MacClyment and its payment to him operated as a discharge of the Strawn mortgage. The chancellor, after overruling exceptions to this report, entered a decree in conformity therewith dismissing the cross-complaint for want of equity and granting the prayer of the original complaint. From that decree Bradley Polytechnic Institute appeals.

In our opinion the evidence sustains the finding of the master and supports the decree. George R. MacClyment was the only person authorized to receive payment of the indebtedness due from Mrs. Strawn to appellant. The evidence is that he made several trips to see Mrs. Strawn about paying this obligation after it became due on January 10, 1934. He told her he knew where an amount sufficient to pay off appellant and the amount due on the second mortgage to Mrs. Blair could be obtained. On July 2, 1935 he obtained this amount for these specific purposes from Mrs. Westlake and thereafter on July 24, 1935 in compliance with his request Mrs. Strawn came to his office at the Institute and executed the new note for $5025.00 and the trust deed securing it, together with an assignment of the trust certificate, that thereupon MacClyment delivered to Mrs. Strawn the release of the Blair mortgage but did not give her a release for the mortgage held by appellant,

his operation as a payment of the Ottawa note and mortgage which the Institute held. After the issues were made up the cause was referred to the Master, who took the evidence and reported the same, together with his conclusions, to the commission. The master found that in this transaction McCullough was acting as sole business manager of the Institute, that in procuring the sum of $2082.00 from Jane Hamilton, McCullough was to pay the Brown indebtedness to the Institute and that said indebtedness was in fact paid by McCullough and its payment to him constituted a discharge of the Brown mortgage. The commission, after overruling exceptions to this report, entered a decree in conformity therewith dismissing the cross-complaint for want of equity and quieting the title of the Institute. This bill has been filed by independent claimants appealing.

In our opinion the evidence justifies the finding of the master and supports the decree. George H. McCullough was the only person authorized to receive payment of the indebtedness due from Brown to appellant. The evidence in this record satisfactorily shows that Brown sought to see Mrs. McCullough after it became due on January 15, 1921. He told her he knew that he owed an amount sufficient to pay off appellant and the amount due on the second mortgage to Mrs. Hamilton could be ascertained. On July 2, 1921 he obtained this amount for these specific purposes from Mrs. McCullough and thereafter on July 24, 1921 in compliance with his request Mrs. Hamilton came to his office at the Institute and executed the new note for $2082.00 and the first deed recording it, together with an assignment of the first mortgage, that instrument McCullough delivered to Mrs. Brown the balance of the Hart mortgage but did not give her a release for the mortgage held by appellant,

although he had previously received from Mrs. Westlake the amount represented by the note and mortgage which appellant held. From all the evidence it is apparent that MacClyment was acting in his capacity as agent and business manager of appellant when he received the money from Mrs. Westlake for the specific purpose of discharging appellant's mortgage and payment to him, in equity, operated as a payment to appellant and discharged the indebtedness due appellant upon the Strawn note and mortgage. When, on July 24, 1935, MacClyment refused to deliver to Mrs. Strawn the release of the mortgage held by appellant, he had previously received from Mrs. Westlake full payment thereof. In bringing about this payment he was acting as appellant's representative. MacClyment by his negotiations as agent for appellant procured from Mrs. Westlake a sum of money sufficient to satisfy the Strawn mortgage which appellant held. Appellant does not contend that MacClyment was the agent of Mrs. Strawn but insist that the evidence discloses that what he agreed to do was to arrange for the refinancing of her loan to appellant. What the evidence discloses is that MacClyment advised Mrs. Westlake that appellant held a mortgage on Mrs. Strawn's property, that there was a junior lien thereon held by another party, that they aggregated approximately $5,000.00, that if she would give him that amount he would pay off those liens and procure a note secured by a first lien upon the Strawn property for her. Upon these representations Mrs. Westlake gave him $5,000.00 for those express purposes and this money came into his hands as the only person authorized by the by-laws of appellant to receive it. Counsel for appellant argue, however, that inasmuch as MacClyment did not pay the amount due appellant upon the Strawn indebtedness but converted it to his own use, the only reasonable conclusion

although he had previously received from him. Deskins the amount represented by the note and mortgage which appellant held. From all the evidence it is apparent that McCllyment was acting in his capacity as agent and business manager of appellant when he received the money from Mrs. Deskins for the specific purpose of discharging appellant's mortgage and lien on the property, in equity, operated as a payment to appellant and discharged the indebtedness due appellant upon the Strawn note and mortgage. When, on July 24, 1933, McCllyment refused to deliver to Mrs. Strawn the release of the mortgage held by appellant, he had previously received from Mrs. Deskins full payment thereof. In bringing about this payment he was acting as appellant's representative. Encouraged by his negotiations as agent for appellant procured from Mrs. Deskins a sum of money sufficient to satisfy the Strawn mortgage held appellant said. Appellant does not contend that McCllyment was the agent of Mrs. Strawn but implies that the evidence discloses that what he agreed to do was to arrange for the refinancing of her loan to appellant. But the evidence discloses is that McCllyment advised Mrs. Deskins that appellant held a mortgage on Mrs. Strawn's property, that there was a junior lien thereon held by another party, that that mortgage approximately $3,000.00, that if she would give him what money he would pay off those liens and procure a note secured by a first lien upon the Strawn property for her. Upon these representations Mrs. Deskins gave him $3,000.00 for those purposes purposes and this money came into his hands as the only person authorized by the terms of appellant to receive it. Counsel for appellant argue, however, that inasmuch as McCllyment did not pay the amount due appellant upon the Strawn indebtedness but converted it to his own use, the only reasonable conclusion

that can be drawn from the admitted facts is that he continued to hold this money as the agent of Mrs. Westlake and that the result of the entire transaction was that the Strawn mortgage to appellant remained a first lien and that Mrs. Westlake's mortgage is inferior to its lien. We do not think so. There came into MacClyment's hands as agent of appellant money furnished by Mrs. Westlake for the express purpose of satisfying the Strawn mortgage which appellant held. The receipt by MacClyment of this amount was in fact payment to appellant and operated, in equity, to discharge the lien thereof. MacClyment so stated in his letter to Mrs. Strawn of November 18, 1935 hereinbefore referred to. Furthermore some time later Ross S. Wallace, president of appellant, stated to John J. Strawn that he had seen a copy of this letter and then advised Strawn that some of MacClyment's affairs were not in proper order but for Mr. Strawn to go home and not to worry. Mr. Strawn testified that Mr. Wallace also said to him upon this occasion: "You will not have any interest or principal to pay, don't give it any worry".

The evidence is further that the books of appellant relative to the Strawn loan were under the suprevision and control of Mac Clyment and they disclose that on September 5, 1935 MacClyment credited the Strawn mortgage with $124.31, which reduced the principal sum due to $2500.00, that on the same day the books show an interest payment of $76.20 and on January 22, 1936 a further credit is shown of $76.10 interest due January 10, 1936. These last entries were made by MacClyment so that the records of appellant would disclose that this loan was in good standing. There was also introduced in evidence a statement in the handwriting of MacClyment showing the Westlake and Strawn transaction. The amount

that can be drawn from the altered terms is that he continued to hold this money as the agent of Mr. Wardlaw and that the result of the audits transcribing the first the journals to applicant transferred a third line and that Mr. Wardlaw's authority in interest to his line. He is not that so. There came into McGlynnon's hands an agent of applicant money transferred by Mr. Wardlaw for the express purpose of satisfying the terms mortgage which applicant held. The proceeds by McGlynnon of this amount was in fact payment to applicant and creditor, in equity, so discharge the lien thereof. McGlynnon is stated in his letter to Mr. Brown of September 16, 1933 hereinbefore referred to. Subsequent some time later Rose E. Wallace, president of applicant, stated to John S. Brown that he had seen a copy of this letter and then stated Brown that some of McGlynnon's affairs were not in proper order but for Mr. Brown to go here and not to worry. Mr. Brown testified that Mr. Wallace also said to him upon this occasion: "You will not have any interest or principal to pay, don't give it any worry".

The evidence is further that the notes of applicant relative to the Brown loan were under the supervision and control of McGlynnon and they disclose that on September 7, 1933 McGlynnon executed the [illegible] with Mr. Wardlaw, which reduced the principal sum due to $25000.00, that on the same day the books show an interest payment of $70.80 and on January 22, 1936 a further credit is shown of $70.10 interest due January 16, 1936. These last entries were made by McGlynnon so that the records of applicant would disclose that this loan was in good standing. There was also introduced in evidence a statement in the handwriting of McGlynnon showing the Wardlaw and Brown transaction. The amount

he received from Mrs. Westlake appears thereon, together with the amount he paid to procure the release of the Blair mortgage, together with various other items such as abstract expenses, taxes, recording and the items credited to the Strawn account on appellant's books for interest and the balance as shown by the books of appellant just referred to.

The decree is sustained by the evidence and will therefore be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

9530

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEBER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On MAY 1 [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9530 AGENDA NO. 20

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D.1940.

| | |
|---|---|
| JAMES J. McCAULEY, Administrator etc., Appellee, v. AUGUSTA PETERS, et al (Walter Haertel, Appellant) | APPEAL FROM THE CIRCUIT COURT OF McHENRY COUNTY. |

DOVE, J.

On March 15th, 1939 James J. McCauley, Administrator de bonis non with the Will Annexed of the Estate of Charles Peters, deceased, filed his petition in the County Court of McHenry County to sell the real estate of his testate to pay the debts of said decedent. A hearing was had, resulting in a decree directing the administrator to proceed to advertise and sell said real estate as provided by law. To reverse this decree Walter Haertel, one of the defendants, appealed to the Supreme Court of this State, which transferred the cause to this court.

From the record it appears that Charles Peters, a resident of the Village of Huntley, died on November 23, 1939, testate, leaving Augusta Peters, his widow, and an adult daughter, Caroline Peters Webster, his only heirs and devisees. By the provisions of his will he bequeathed and devised his property to his daughter subject to the life estate of his widow. On December 23, 1929 this will was duly admitted to probate and letters testamentary issued to his widow.

No. 25. 1938.

In the

Supreme Court of Florida

October Term

A.D. 1938.

Plaintiff, Appellee,

vs.

Appellee

Defendant, Appellant.

Appeal from the County

Court of Madison County.

STATE OF FLORIDA.

Brief.

On March 14th, 1937 Jesse E. Hickory, Administrator in bonis non with the Will Annexed of the estate of Charles Peters, deceased, filed his petition in the County Court of Madison County to sell the real estate of his intestate to pay the debts of said decedent. A hearing was had, resulting in a decree directing the administrator to proceed to advertise and sell said real estate as provided by law. In pursuance this decree Walter Hartel, one of the defendants, appealed to the Supreme Court of this State, which transferred the cause to this court.

From the record it appears that Charles Peters, a resident of the village of Hurley, died on November 7, 1929, testate, leaving surviving him, his widow, and an adult daughter, Caroline Peters Hickory, his only heirs and devisees. By the provisions of his will he bequeathed and devised his property to his daughter subject to the life estate of his widow. On December 17, 1929 Mrs. Hickory was duly qualified as probate and lawful administratrix issued to her.

The following March Term of the Probate Court was fixed for the adjustment of claims and publication duly made thereof and an order entered by the County Court determining heirship and appointing appraisers as provided by law. On June 6, 1931 E. H. Cook filed his claim for funeral expenses and this claim was allowed and judgment rendered in his favor for $324.25 on November 26, 1934. Nothing further appears to have been done toward the settlement of the estate until April 8, 1936 when Mrs. Peters, as executrix, filed her inventory which disclosed that her husband left no personal property of any kind or character but owned the dwelling in the Village of Huntley, which was occupied by himself and wife at the time of his death and according to the inventory worth $1500.00. This inventory was duly approved. On December 28, 1936 the said Edward H. Cook filed his petition setting forth that he was a judgment creditor of said estate and interested in its administration and that Augusta Peters was both physically and mentally incapable of continuing her duties as executrix and praying for her removal. Upon a hearing an order was entered removing her and James J. McCauley was duly appointed administrator de bonis non with the Will Annexed of the estate of Charles Peters, deceased. Thereafter the appraisers, appointed on December 23, 1929, filed their report fixing the amount of the widow's award at $600.00, which was duly approved and an order entered finding the condition of the estate. By this order it appeared that the liabilities consisted of said widow's award of $600.00, claims allowed amounting to $354.25 and costs due and to accrue amounting to $275.00, all of which aggregated $1229.25 and that there were no assets in the hands of the administrator. Thereupon the instant verified petition to sell real estate to pay debts was filed by said McCauley as administrator. The petition

recited the foregoing facts and further alleged that since the death of Charles Peters the real estate had been rented for $20.00 per month, which rents had been collected by the Evangelical Lutheran Old Folks Home of Chicago. It was further alleged that the taxes had not been paid and that the taxes and penalties upon the property amounted to $380.09 and that the property had been forfeited to the State of Illinois for non-payment of taxes. Appellant was made a party defendant to this proceeding and on June 5, 1939 filed the following unverified answer: "Now comes the defendant by Marcus J. Sternberg, his attorney, and denies each and every allegation set forth in the action brought by the plaintiff herein and calls for strict proof. He denies the right of the plaintiff to recover upon said action so brought by him herein".

The record discloses that upon the hearing counsel for appellant objected to the court proceeding to render a decree or entertaining the proceeding on the ground that seven years had elapsed after the death of Charles Peters before the petition to sell real estate was filed and objected to the introduction in evidence of the appraisers' estimate of the amount of the widow's award and the approval thereof by the court. These objections were overruled and the cause proceeded to a decree and it was stipulated by counsel for the purpose of making up the record on appeal that the several petitions and orders herein referred to should be made a part of the record on appeal, together with a copy of the record of an assignment by Augusta Peters executed December 15, 1938 by the provisions of which she assigned to the Evangelical Lutheran Old Folks Home Association of Chicago all the rights which she might have in the estate of Charles Peters as his surviving widow, heir, legatee or devisee. The decree, in addition to finding this fact, also found that the daughter, Mrs. Webster, had

conveyed her interest in the premises to her mother and had also conveyed to her mother all her distributive share in the estate of Charles Peters, deceased, and further that on April 6, 1932, Enos Connley had obtained a judgment against Augusta Peters in the amount of $319.13 in the Circuit Court of McHenry County and that on July 25, 1932 the State Bank of Huntley had also obtained a judgment against her in said court for $226.11 and that on July 27th, 1934 Walter Maertel, appellant herein, had obtained a judgment in said court against the said Augusta Peters for $192.00. The decree further found that the said E. H. Cook had filed a claim against said estate for the funeral expenses of the deceased and that his claim therefor had been duly allowed by the executrix and that Dr. Oliver I. Stoller had filed his claim against said estate for professional services rendered the deceased during his last illness and that said claim had been duly allowed on March 10th, 1937.

Counsel for appellant argue that this petition was based in part upon a widow's award which was allowed more than seven years after the death of the testator and that the decree is therefore erroneous.

The law is that while there is no statute of limitations barring proceedings by administrators for the sale of land to pay debts, yet the right to sell the real estate of a deceased person for such purposes will be barred after the lapse of seven years unless the delay can be satisfactorily explained and in this respect each case must rest upon its own peculiar facts. Hurlbut v. Talbot, 273 Ill. 299. It appears from this record that the only property which Charles Peters owned at the time of his death was the property which this decree orders sold. At the time of his death on November 23,

[illegible] his interest in the premises to his mother and she [illegible] answered to her mother all her distributive share in the estate of [illegible] Peters, deceased, and further that on April 6, 1937, Rose Hamsley had obtained a judgment against Amanda Peters in the amount of $[illegible] in the Orleans Court of Common Pleas and that on July [illegible] 1938 the State Bank of Dunlap had also obtained a judgment against her in said court for $[illegible] and that on July 27th, 1938 Walter Sherrel, superintendent, had obtained a judgment in said court against the said Amanda Peters for $[illegible]. The decree further finds that the said R. T. Dean had filed a claim against said estate for the funeral expenses of the deceased and that his claim therefor had been duly allowed by the executrix and that Dr. Oliver I. Dolifer had filed his claim against said estate for professional services rendered the deceased during his last illness and that said claim had been duly allowed on March 10th, 1937.

Counsel for appellant argue that this position was based in part upon a widow's award which was allowed more than seven years after the death of the testator and that the decree is therefore erroneous.

The law is that while there is no statute of limitations barring proceedings by administrators for the sale of land to pay debts, yet the right to sell the real estate of a deceased person for such purpose will be barred after the lapse of seven years unless the delay can be satisfactorily explained and in this respect each case must rest upon its peculiar facts. [illegible] v. [illegible], [illegible] [illegible].

It appears from this record that the only property which Charles Peters owned at the time of his death was the property which Amanda Peters owned at the time of his death on November 29,

1929 he and his wife were occupying the same as their homestead. His will was admitted to probate and on December 23, 1929 his widow was appointed executrix of his estate. She fixed a day for the adjustment of claims, made publication to that effect and the court appointed appraisers. On November 26, 1934 the claim of Edward H. Cook for funeral expenses was allowed by the County Court and thereafter the executrix filed an inventory. On December 24, 1936, which was seven years and five days after the executrix was appointed, Edward H. Cook as a judgment creditor filed his petition to have the executrix removed, alleging her physical and mental incapacity. When she became mentally and physically incapacitated does not appear, but she was removed and the present administrator with the will annexed was appointed to complete the settlement of her estate and the appraisers appointed by the court in 1929 fixed the amount of the widow's award and this was approved by the court and this award, together with the allowed claims for funeral expenses and for physician's services rendered the deceased in his last illness form the basis for the present proceeding. The facts in all of the cases cited and relied upon by counsel for appellant are easily distinguishable from the facts as disclosed by this record. When this property ceased to be the homestead of the surviving widow of Charles Peters does not appear and in our opinion the court in the instant case rendered the only decree that was warranted under the authorities. The delay of the executrix Augusta Peters in settling this estate and having an award set off to her cannot prevent the present petitioner, who is the administrator de bonis non with the will annexed, from proceeding to subject the real estate of the deceased to the payment of the allowed claims against his estate.

The statute under which this proceeding is had provides that the practice in such cases shall be the same as in Chancery. The question of laches in the allowance by the court of the widow's award or laches in filing the instant petition was not raised by any pleading filed by appellant and is therefore not available to appellant. Hirsh v. Arnold, 318 Ill. 28: Elting v. First Nat'l. Bank, 173 Ill. 368.

The decree will be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

9514

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9514 AGENDA NO. 24.

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT,

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| HUGH G. PARSONS,<br>Appellant,<br>vs.<br>PARSONS LUMBER COMPANY, INC.,<br>a Corporation,<br>Appellee.<br>-------<br>PARSONS LUMBER COMPANY, INC.,<br>a Corporation,<br>Appellee,<br>vs.<br>HUGH G. PARSONS,<br>Appellant. | APPEAL FROM THE CIRCUIT COURT<br>WINNEBAGO COUNTY. |

HUFFMAN - J.

The Parsons Lumber Company was incorporated about 1922. Hugh G. Parsons became President of the company and continued in such capacity until the close of 1931. After his services had been severed as President and manager of the corporation, he brought suit against the company for $1951.20 for back salary. The company filed answer and counterclaim in that suit. Parsons filed replies to the answer and counterclaim. While that suit was pending, the corporation filed its complaint in chancery against Parsons for an accounting with respect to certain items of expenditures of the company's funds. The trial court consolidated the law case with the chancery action.

It appears by the allegations in the bill for accounting, that between January 1, 1927, and December 31, 1931, Parsons had expended $18,988.83 of the company's money, which expenditure was grouped under three headings, designated as "expense account," "travelling expense," and "Auto expense." It was alleged that none of these expense accounts disclosed for what purpose the money was used, and it was charged that he had used the same for wrongful purposes; that such expenditures were not all bona fide and made in connection with the business of the company. The complaint for accounting prayed for discovery as to the actual use and purpose for which the money was expended; that an accounting be had in order to determine what sums were improperly expended, and that upon such an accounting, a decree might be entered finding the amount which should be returned to the plaintiff corporation by Parsons.

Parsons filed answer to the complaint for accounting, admitting that he had been President as charged; denying that he had made the alleged expenditures of the company's money without the knowledge and consent of the directors and stockholders; denying that his reports of such expenditures were made so as to conceal the true nature thereof and the purpose for which the same were used; alleging that all of the expenditures were for the benefit of the corporation, made with the knowledge and consent of its Board of Directors and the stockholders thereof, and approved by them at each annual meeting, to and including December 31, 1931. The defendant Parsons denied all charges of misconduct with respect to the use of the company's money and denied its right to an accounting.

On June 26, 1936, the then sitting Judge of the circuit court of Winnebago county, entered a decree for accounting, wherein many

findings of fact were incorporated. By that decree the court found that Parsons had been fully paid his salary up to the time his services with the corporation were terminated and that he had no salary due him, and that in fact he had overdrawn his salary in the sum of $300. The decree then found that certain expenditures were made by Parsons of the company's money, which corresponded to the tabulation of same as set out in the complaint for accounting; that Parsons had failed to itemize such expenditures and that there was nothing to show for what purpose the money was used, other than the general designation of general expense, travelling expense, and automobile expense, as above mentioned. The court decreed that the company was entitled to an accounting from Parsons with respect to the expense items of $18,988.83, and that he should return to the corporation such portion of said expense money as should be found to have been improperly expended, and ordered an accounting taken to determine such amount. The court then decreed that the total sum of $19,288.83 (being comprised of the two items of $18,988.83, expenses, and $300, salary), should be the subject of the accounting; that the company was entitled to a decree for said amount against Parsons, subject to change by the further order of the court upon the report of the Master in Chancery to whom the cause was referred to take the accounting.

The Master proceeded to take the accounting. He found by his report that Parsons owed the corporation the sum of $554.83. The company filed objections to the Master's report. Parsons filed objections thereto. All objections to the report were overruled by the Master, and were permitted to stand as exceptions thereto in the trial court. The Master's report was filed January 14, 1937.

findings of fact were incorporated. He then decree the court found that Thomas had been fully paid his salary up to the time his services with the corporation were terminated and that he had no salary due him, the fact is that he had overdrawn his salary in the sum of $[illegible]. The decree that that [illegible] adjustments were made by officers of the company's money, which corresponded to the capitalization of some as not up in the equitable for recounting that Thomas had failed to identify and approximate and that there was nothing to show for what purpose the money was used, other than the general designation of general expenses, travelling expenses, and automobile expense, as above mentioned. The court decreed that the company was entitled to an accounting from Thomas with respect to the expense items of $[illegible], and that he should repay to the corporation such portion of said expense money as should be found to have been improperly expended, and ordered an accounting taken to determine such amount. The court then decreed that the total sum of $12,[illegible].83 (being composed of the two items of $[illegible].83, expense, and $750, salary), should be the subject of the accounting; that the company was entitled to a decree for said amount against Thomas, subject to change by the further order of the court upon the report of the Master in Chancery to whom the cause was referred to take the accounting.

The Master proceeded to take the accounting. He found by his report that Thomas owed the corporation the sum of $[illegible].83. The company filed exceptions to the Master's report. Thomas filed objections thereto. All objections to the report were overruled by the Master, and were permitted to stand as exceptions thereto in the final court. The Master's report was filed January 31, 1917.

Following the entry of the decree of June 26, 1936, ordering the accounting as to the fund in question, there was a succession to the jurisdiction, the Judge granting the decree for accounting having died. On July 27, 1939, the circuit court of said county, in making disposition of this cause, entered a decree wherein it is recited that the court was uncertain as to whether or not the decree of June 26, 1936, was a final decree, but wherein the same was treated as a final decree, and binding upon the parties and upon the court, in adjudicating and determining that Parsons was indebted to the corporation in the aggregate amount of $19,288.83. The court by the present decree finds that it has no power to change or amend the decree of June 26, 1936; that it was final as an adjudication of the matters in controversy between the parties and of their rights relative to the subject matter of the litigation. All exceptions to the Master's report were denied on the ground that the decree for accounting entered June 26, 1936, was final and binding on the parties.

It is maintained on the part of appellee corporation that the decree of June 26, 1936, was final and determined the rights between the parties, and gave judgment against Parsons in the sum of $19,288.83.

It is maintained by appellant that such is not the situation, that otherwise, there would have been no object to granting an accounting; that a decree is not complete which requires further judicial action on the part of the court to give it effect and to grant the relief sought; that this was an action for an accounting; that the right to the accounting was denied and the amount involved, in dispute; that under such circumstances, the right to the accounting was a question to be first determined by the court; that such finding was interlocutory in its nature; that the amount for which

Following the entry of the decree of June 26, 1926, ordering the accounting as to the land in question, there was a proceeding in the jurisdiction, the court granting the decree for accounting having died. On July 27, 1926, the circuit court of said county, in making distribution of said funds, entered a decree which recites it is recited that the court was unwilling as to whether or not the decree of June 26, 1926, was a final decree, but nevertheless the case was treated as a final decree, and binding upon the parties and upon the court, in adjudicating and determining that Lawson was indebted to the appellation in the aggregate amount of $19,[illegible].

The court by the present decree finds that it was no error to enter or amend the decree of June 26, 1926; that it was final as an adjudication of the matters in controversy between the parties and of their rights relative to the subject matter of the litigation. All exceptions to the Master's report were denied on the ground that the decree for land dating entered June 26, 1926, was final and binding on the parties.

It is maintained on the part of appellee contention that the decree of June 26, 1926, was final and determined the rights between the parties, and gave judgment against Lawson in the sum of $19,[illegible].

It is maintained by appellant that such is not the situation, that otherwise, there would have been no object to treating an accounting; that a decree is not complete which requires further judicial action on the part of the court to give it effect and to reach the relief sought; that this was an action for an accounting; that the right to the accounting was denied and the amount involved, if anyone that could be ascertained, the right to the accounting was a question to be first determined by the court; that such finding was interlocutory in its nature; that the amount for which

Parsons might be liable was not then fixed and determined by such decree, but that the decree merely set out the particular fund for which the accounting was to be had; and that a final judgment could not be rendered in the case until after the Master had taken the accounting.

It is thus apparent that the disposition of this appeal depends upon whether the decree of June 26, 1936, is to be considered as a final decree, or as interlocutory in character.

It appeared from the allegations of the complaint for accounting, that the character thereof was complicated and extended, and involved many transactions extending over a period of five years. The decree granting the prayer for accounting was proper. The right of the corporation to the accounting was denied by Parsons. Where the liability to account is denied, there must be an interlocutory decree finding such liability before there can be a reference to a Master. The decree in this case directed the Master as to what items the account should extend. This was proper, as such directions included only the items that were in dispute.

Sometimes the accounting is the main relief sought. In other instances, it is only ancillary to other relief granted, and in such cases the decree by which the accounting is granted, may be final with respect to rights of the parties which must first be determined before an accounting would be in order. Here, the items constituting the subject of the accounting, were in sharp dispute as between the parties and nothing appeared in the pleadings at the time of the decree of June 26, 1936, to indicate in what manner or for what purpose the money was used. That was the sole question to be determined upon the evidence introduced before the Master upon the hearing. Neither party was in position at the time of the decree of

June 26, 1936, to say that such decree was final as to the amount of money for which Parsons should be held liable to the corporation. An appeal from that decree would have settled nothing, as no court could pass upon the questions involved until the accounting had been taken and the evidence presented as to the nature of such expenditures and the purposes for which they were made. It was the determination of this that necessitated the accounting, and it was the necessity of the accounting which made the decree of June 26, 1936, interlocutory. No rights of the parties appear to exist, except such as were incident to the accounting itself.

Appeals should not be taken piecemeal. As stated in The People v. Stony Island Savings Bank, 355 Ill. 401, at p. 403, "A decree is appealable only when it terminates the litigation between all of the parties on the merits, and when, if affirmed, the court which rendered it has only to proceed with its execution." And further, at p. 404, "But if a decree provides that jurisdiction be retained for the future determination of matters of substantial controversy between the parties, it is not final." There is no question in this case but that the decree retained jurisdiction for the future determination of how much, if anything, Parsons was to be held liable for, to the corporation. This was the sole controversy between the parties and hence it is evident that the decree of June 26, 1936, was not a final decree. Since the decree of July 27, 1939, from which this appeal is taken, treats the decree of June 26, 1936, as being final and conclusive between the parties, it is erroneous. The authorities referred to in the above case, and in Smith v. Bunge, 358 Ill. 229, are illustrative of, and conclusive, with respect to the above questions.

As we view the decree of June 26, 1936, in the event an appeal had been taken therefrom and affirmed, there would have been nothing

[illegible] 26, 1976, is my [illegible] before you filed in the second [illegible] for which [illegible] could be held liable to the corporation. [illegible] from that decree you will have evidence nothing, so to speak [illegible] you the [illegible] involved until the recommitting had been [illegible] and the evidence presented in the nature of such arrangements and the purposes for which they were made. It was the determination of this that constituted the recommitting, and it was the necessity of its execution which made the decree of June 26, 1976, interlocutory. The [illegible] of the petition cannot be valid, except such as were incident to the recommitting itself.

Appellee argued that the issue disappeared. He quoted as the [illegible] in Albany Lumber Co., 171 Ga. 841, 84 S. E. 1, "A decree is appealable only when it terminates the litigation between all of the parties on the merits, and does, if affirmed, the court thereafter [illegible] in process of execution." And further, at p. 844, "If a decree recites that jurisdiction is retained for the future determination of matters of which it constitutes between the parties, it is not final." There is no question in this case but that the decree recited jurisdiction for the future determination of new [illegible], if anything, remains to be said finally to, in the courts. This was the [illegible] contemporary [illegible] the parties and hence it is evident that the decree of June 26, 1976, was not a final decree. Since the decree of July 27, 1977, from which this appeal is taken, [illegible] the decree of June 26, 1976, as [illegible] and conclusive [illegible] the parties, it is erroneous. The [illegible] cited to it [illegible] case, and in Smith v. Dunn, 154 Ga. 50, the [illegible] [illegible], and conclusive, [illegible] to the [illegible] questions.

If we view the decree of June 26, 1976, as not an appeal [illegible] taken therefrom and affirmed, there would have been nothing

the trial court could have done toward proceeding with the decree, until after the accounting had been taken and report of the Master filed. The fact that the court by the former decree held that appellant company was entitled to have an accounting as to certain items of expense charged by Parsons, did not produce a situation where it can be said, that it followed as a matter of law, that anything was due and owing by Parsons, to the corporation. The reference to the Master was made for the purpose of determining this question. Thus we find that matters of substantial controversy in issue between the parties, were not determined by the decree of June 26, 1936, and could only be determined upon the accounting. This is manifest from the decree itself, as it reserves jurisdiction of the case, pending the outcome of the hearing before the Master. Therefore, we do not consider the reference in this case to have been an execution of the decree, but only preparatory to the rendition of a final decree.

The decree of July 27, 1939, from which this appeal is prosecuted, is reversed and the cause remanded with direction that the trial court proceed to consider the exceptions as filed to the Master's report, following which, a final decree shall be rendered.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

40438

2063 LAWRENCE AVENUE BUILDING CORPORATION,
Appellant,

v.

GUS VAN HECK, CHICAGO FLAT JANITOR'S UNION LOCAL NO. 1, JOSEPH EDWARD,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

305 I.A. 486

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is pending on rehearing granted on petition of the plaintiff. The action in the trial court was in chancery for an injunction to restrain defendants from maintaining pickets at plaintiff's premises. The bill charged the picketing was with intimidation, threats and violence. A preliminary injunction issued as prayed. The defendants answered admitting the maintenance of the pickets but denying threats, intimidation or violence and claiming under the Anti-Injunction Statute (Ill. State Bar Stats., chap. 48, §1, par. 2a, p. 1549-1550; Laws of 1935, p. 378, Smith-Hurd Anno. Stats., chap. 48, par. 2a, p. 158), the picketing was lawful. The cause was referred to a Master, who took the evidence and reported, finding the averments of the answer sustained, recommending the dissolution of the injunction and dismissal of the amended bill. Objections by plaintiff before the Master upon the hearing before the Chancellor stood as exceptions, were overruled by Master and Chancellor and a decree entered as recommended. Plaintiff appeals.

Section 1 of the Anti-Injunction Act provides:

"No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do ; or from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or

MR. PRESIDING JUSTICE MACNALLY DELIVERED THE OPINION OF THE COURT:

This appeal is pending on rehearing granted on petition of the plaintiff. The action in the trial court was in chancery for an injunction to restrain defendants from maintaining picets at plaintiff's premises. The bill charged the picketing was with intimidation, threats and violence. A preliminary injunction issued as prayed. The defendants answered admitting the maintenance of the picets but denying threats, intimidation or violence and claiming under the Anti-Injunction Statute (III. Rev. Stat. 1951, chap. 48, par. 2a, p. 1242-1250) laws of 1937, p. 270, half-hour ses. Stat., chap. 48, par. 2a, p. 1249), the picketing was lawful. The cause was referred to a Master, who took the evidence and reported, finding the averments of the answer sustained, recommending the dissolution of the injunction and dismissal of the amended bill. Objections by plaintiff before the Master upon the hearing before the Chancellor stood as exceptions, were overruled by Master and Chancellor and a decree entered as recommended. Plaintiff appeals.

Section 1 of the Anti-Injunction Act provides:

"No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peacefully and without threats or intimidation persuading, advising, or inducing others so to do; or from peacefully and without threats or intimidation being upon any public street, or thoroughfare or elsewhere for the purpose of obtaining or communicating information, or

to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

The evidence shows the pickets, Robert McLeod and Joseph Burns, were not employees of the plaintiff corporation. They were not prospective applicants for employment, but were members of the defendant union and for many years had not rendered service as janitors. They testified, denying threats, intimidation or force, and the Master found these unlawful methods had not been used. They admit that in so far as possible a "secondary boycott" was established against plaintiff in attempting to induce the repair man, the coal man, the milkman, the garbage man, the laundry man, etc. to cease performing their usual services for plaintiff and its tenants. One of the pickets occupied the alley in the rear of the building; another the street in front of it intercepting persons furnishing services, goods, etc. to plaintiff and its tenants, and in so far as possible persuaded them to refrain from doing so.

The building consisted of 37 one-room furnished apartments in which about 75 persons lived. It was a three-story brick with English basement. Plaintiff rented the apartments furnished. There was one store in the basement. These pickets were placed at plaintiff's premises on July 30, 1937. There was no dispute between plaintiff and any of its employees concerning terms or conditions of employment at that time or since. Anton Kaslukas, a member of the defendant Flat Janitor's Union, was then employed as a janitor. He continued to serve until March 17, 1938, when he was discharged by plaintiff after notice. The janitor work to be done at the building did not require the full time of a janitor. Kaslukas served and was paid on the basis of part time service. He received compensation of $75 per month. So far as the evidence shows, he did not at any time complain as to the wages paid or the conditions under which he worked. He testified, however, that the manager of the building asked him to render certain kinds of service which he told the manager was against

to peacefully and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or be peacefully and without threats or intimidation cause to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

The evidence shows the pickets, Robert Nelson and Joseph Burns, were not employees of the plaintiff corporation. They were not prospective applicants for employment, but were members of the defendant union and for many years had not rendered service as janitors. They testified, denying threats, intimidation or force, and the master found these unlawful methods had not been used. They admit that in so far as possible a "secondary boycott" was established against plaintiff in attempting to induce the repair man, the coal man, the milkman, the garbage man, the laundry man, etc. to cease performing their usual services for plaintiff and its tenants. One of the pickets occupied the alley in the rear of the building another the street in front of it intercepting persons furnishing services, goods, etc. to plaintiff and its tenants, and in so far as possible persuaded them to refrain from doing so.

The building consisted of 37 one-room furnished apartments in which about 75 persons lived. It was a three-story brick with English basement. Plaintiff rented the apartments furnished. There was one store in the basement. These pickets were placed at plaintiff's premises on July 22, 1937. There was no dispute between plaintiff and any of its employees concerning terms or conditions of employment at that time or since. Anton Laukkanen, a member of the defendant Flat Janitor's Union, was then employed as a janitor. He continued to serve until March 17, 1938, when he was discharged by plaintiff after notice. The janitor work to be done at the building did not require the full time of a janitor. Laukkanen served and was paid on the basis of part time service. He received compensation of $75 per month. So far as the evidence shows, he did not at any time complain as to the wages paid or the conditions under which he worked. He testified, however, that the manager of the building asked him to render certain kinds of service which he said the manager was entitled

the union rules. The proof does not show whether there was any quarrel about this or whether Kaslukas was discharged for that reason. At any rate he made no protest against his discharge. He has not asked for reinstatement. A subsequent statement by plaintiff's president indicates Kaslukas was thought to be negligent, and that this was one of the reasons for discharge. The defendant, union has not complained about his discharge or asked reinstatement.

Before the employment of Kaslukas was terminated in March, 1936, plaintiff installed a supposed labor-saving device known as an automatic stoker, designed to perform mechanically the work of feeding coal into the furnace. The plaintiff informed Kaslukas of this and that it would render less janitor service necessary. When the employment of Kaslukas ended plaintiff employed a Mrs. Vickery to perform certain services in connection with the apartments. Mrs. Vickery also took upon herself the duty of shoveling coal into the stoker. She is the wife of William Vickery. Together they occupy an apartment in the basement of the building. She is paid $50 per month for her services. The husband, William Vickery, also renders casual services in and about the building when and as requested. He draws no fixed salary or wages. His compensation depends on the amount of services rendered. Neither Mr. or Mrs. Vickery have made any complaint as to their wages or the conditions under which they work. Neither of them belongs to the defendant union. The evidence shows (and is not contradicted) that one of the pickets invited Mr. Vickery to join the union. He inquired how much it would cost and was told $215. Mr. Vickery replied that he could not afford it.

June 21, 1937, Gus Van Heck, secretary-manager of the defendant union, wrote to Mr. Holmes of the plaintiff corporation that an agreement had been entered into between the Chicago Real Estate Board and the Chicago Flat Janitor's Union, Local No. 1, specifying that all buildings cared for by other than the owner must have the services of a union janitor; that this building was being serviced

the union rules. The proof does not show whether Tuley was put
upward about this or another failure was discharged for that
reason. At any rate he made no protest against his discharge. He
has not asked for reinstatement. A subsequent statement by plain-
tiff's president indicates failure was thought to be negligent,
and that this was one of the reasons for discharge. The defendants,
union has not complained about his discharge or asked reinstatement.

Before the employment of Sullivan was terminated in June,
1955, plaintiff installed a supposed labor-saving device known as an
automatic stoker, designed to perform mechanically the work of
feeding coal into the furnace. The plaintiff informed Sullivan of
this and that it would render him janitor service unnecessary. When
the employment of Sullivan ended plaintiff employed a Mr. Vickery
to perform certain services in connection with the apartments. Mr.
Vickery also had upon himself the duty of wheeling coal into the
furnace. He is the wife of William Vickery. Together they occupy an
apartment in the basement of the building. She is paid $30 per month
for her services. The husband, William Vickery, also renders a general
services in and about the building when and as requested. He does
not fixed salary or wages. His compensation depends on the amount of
services rendered. Neither he, or Mrs. Vickery have been any em-
plaint as to their wages or the conditions under which they work.
Neither of them belongs to the defendant union. The evidence tha-
land is not conclusive that one of the plaintiff's officers, Vickery
to join the union. He inquired how much it would cost and was told
$25. Mr. Vickery replied that he could not afford it.

June 21, 1957, due ten week, secretary-manager of the de-
fendant union, wrote to Mr. Holmes of the plaintiff corporation that
an agreement had been entered into between the Chicago Trail Lodge
Hotel and the Chicago Flat Janitor's Union, Local No. 1, requiring
that all buildings served for by other than the owner must have the
services of a union janitor; that this building the being serviced

by a non-union man. The letter stated: "Cooperation placing union janitor this building greatly appreciated by this office." Plaintiff replied June 30, 1937, that it had no agreement with the Chicago Real Estate Board; that the property had been turned over to the corporation under decree of the U. S. District Court, and that the building was then operated under the decree by the owners. Thereupon, the pickets were placed about the premises.

It is contended in behalf of plaintiff that the evidence shows there was no labor dispute within the meaning of the statute at the time of the picketing. It is pointed out that Kaslukas was discharged more than fifteen months prior to the time the picketing began, and that neither he nor the union made any complaint about the discharge. There is no claim that the work necessary to be done about these premises requires the full time of a janitor. The job at best was about one-third of a job, as shown by the fact Kaslukas also took care of two other buildings. The work to be done was less after the installation of the stoker. The employment of a janitor was never more than casual in its nature. Kaslukas has never asked to get his job back.

The controversy which caused the picketing of the premises was brought on by the request of the union that this casual work should be done by some member of its organization, and apparently it was satisfied if Mr. Vickery would pay dues to the union. Does this dispute rise to the dignity of a "labor dispute" within the meaning of the Anti-Injunction statute? The answer, we think, must be in the negative. In the first place, the dispute is not between the employer and the employee. Recent cases construing this statute hold this is a necessary prerequisite to application of the statute. No employee has made complaint or is now complaining. This is fatal to the defense offered.

In Swing, et al. v. American Federation of Labor, 372 Ill. 91, 22 N. E. (2nd) 967, the Supreme court of our state passed on this point. In that case, Swing and others filed their bill to restrain

by a non-union man. The janitor stated: "Operations placing union janitor this building greatly appreciated by this office." Plaintiff replied June 29, 1937, that it had no agreement with the Chicago Real Estate Board; that the property had been turned over to the operation under decree of the U. S. District Court, and that the building was then operated under the decree by the owners. Thereupon, the pickets were placed about the premises.

It is contended in behalf of plaintiff that the evidence shows there was no labor dispute within the meaning of the statute at the time of the picketing. It is pointed out that business was discharged more than fifteen months prior to the time the picketing began, and that neither he nor the union made any complaint about the discharge. There is no claim that the work necessary to be done about these premises requires the full time of a janitor. The job at best was about one-third of a job, as shown by the fact janitors also took care of two other buildings. The work to be done was done after the installation of the stoker. The employment of a janitor was never more than casual in its nature. Jenkins has never asked to get his job back.

The preliminary injunction granted the plaintiff at the premises was brought on by the request of the union that this casual work should be done by some member of its organization, and apparently it was satisfied if Mr. Vickery would pay dues to the union. Does this dispute give rise to the dignity of a "labor dispute" within the meaning of the Anti-Injunction statute? The answer, we think, must be in the negative. In the first place, the dispute is not between the employer and the employee. Recent cases construing this statute hold this is a necessary prerequisite to application of the statute. In employee has made complaint or is now complaining. This is fatal to the defense offered.

In Bakery, et al. v. American Federation of Labor, 279 Ill. 91, 116 N. E. (2nd) 827, the Supreme Court of our state passed on this point. In that case, Judge Jack writes Illi Ouis Mill is relevant

the defendant union from picketing in front of plaintiffs' place of business. The defendants moved to strike; the motion was granted, and the suit dismissed for want of equity. The facts averred in the bill were that the defendant union demanded that plaintiff require its employees to join it. None of the employees belonged to the union; none of them wished to belong to it. The employees were satisfied with their wages, hours and working conditions. This court reversed the judgment of the trial court and granted a certificate of importance to the Supreme court. (298 Ill. App. 93, 18 N. E. (2nd) 256.) To the contention of the defendants that the injunction was prohibited by the Anti-Injunction Statute, the Supreme court pointed out that the contrary had just been held in Meadowmoor Dairies, Inc. v. Milkwagon Drivers' Union of Chicago, No. 755, 371 Ill. 377, 21 N.E. (2nd) 308, and said:

"The opinion in that case was filed while the present appeal was pending and in it we held the act of 1925 has no application to cases wherein there is no dispute between employer and employee. In that case all of the arguments presented by the appellants in this case were fully considered and it is now unnecessary for us to repeat what we then said."

There was a dissenting opinion citing cases in which it had been held in the construction of a somewhat similar statute that no employer-employee relationship need exist. Lauf v. Shinner & Company, 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872; New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 58 S. Ct. 703, 82 L. Ed. 1012; Senn v. Tile Layers Union, 301 U. S. 468, 57 S. Ct. 857, 863, 81 L. Ed. 1229.

The decision of the Supreme court of this state is, of course, binding upon this court, and the decisions from other jurisdictions are not controlling. The Supreme Court of the United States has denied certiorari in the Meadowmoor case, so that the question in this state now becomes one for the legislature. In the Meadowmoor case the Supreme court distinguishing the case of Senn v. Tile Layers Union, said:

"It is clear from this language the court was limiting its views to the particular statute under consideration and indicating, in the clearest language, that the privilege of picketing, even

the defendant union from picketing in front of plaintiff's place of business. The defendants moved to strike; the motion was granted, and the suit dismissed for want of equity. The facts averred in the bill were that the defendant union demanded that plaintiff require its employees to join it. None of the employees belonged to the union; none of them wished to belong to it. The employees were satisfied with their wages, hours and working conditions. This court reversed the judgment of the trial court and granted a injunction of importance to the business court. (296 Ill. App. 88, 16 N. E. (2d) 289.) To the contention of the defendants that the injunction was prohibited by the anti-injunction statute, the Supreme court pointed out that the statutory law just was not in [illegible]. The.

v. Milkmen Retailers' Union of Chicago, No. 7?? 371 Ill. 377, 21 N.E. (2d) 309, and said:

"The opinion in that case was filed while the present appeal was pending and in it we held the act of 1933 had no application to make shop-girls in the Kingsley Bakeries employers and employes. In that case all of the arguments presented by the appellants in this case were fully considered and it is now unnecessary for us to repeat what we then said."

There was a dissenting opinion citing cases in which it had been held in the construction of a somewhat similar statute that an employer-employee relationship was exist. Lund v. Chicago & Company, 303 E. 6. 283, 88 N. 6. 378, 22 L. 1a. 270; Ben Jonson Alliance v. Quality Grocery Co., 302 N. 6. 222, 22 N. 6. 7?, 27 L. 1a. 1013; Kann v. Tile Layers Union, 301 E. 6. 4?? 6. 7? 6. 27, 227, 223, 21 L. 1a. 1?23.

The decision of the Supreme court of this state is, of course, binding upon this court, and the decisions from other jurisdictions are not controlling. The Supreme Court of the United States has denied certiorari in the Kaufmann case, so that the question in this state now becomes one for the legislature. In the Kaufmann case the Supreme court distinguished the case of Kann v. Tile Layers Union, said:

"It is clear from this language the court was limiting its view to the particular charge under consideration and intimated

where peaceful, did not extend to cases where unlawful acts were committed or intended to be used for the purpose of legalizing secondary boycotts. Many other cases on both sides are cited, but in view of the decisions of this court condemning boycotts and prohibiting the interference with constitutional rights, pointed out herein, the acts of the appellees, in combining, as an aggregation of individuals, to picket in the manner described and found by the master, were unlawful acts and justified the issuance of a permanent injunction as prayed."

We think, too, in this case the Master in finding the picketing was entirely peaceful overlooked the undenied testimony of William Vickery to the effect that one of the pickets (McLeod) came to Vickery's apartment in the building and said that he (Vickery) "would join union or else" and "You don't want us to bomb the place do you?"

The judgment will be reversed and the cause remanded with directions to set aside the order dissolving the injunction and dismissing the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

McCurely, J., concurs.

O'Connor, J., dissents.

40436

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| 2063 LAWRENCE AVENUE BUILDING CORPORATION, Appellant, vs. GUS VAN HECK, CHICAGO FLAT JANITORS UNION, LOCAL NO. 1, JOSEPH BURNS, Appellees. | APPEAL FROM SUPERIOR COURT OF COOK COUNTY. |

305 I.A. 486

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation owns and operates a three-story English basement brick building containing one store and 37 furnished apartments of one room each with Pullman kitchen and bath, in which about 75 tenants live. It filed its bill claiming it was involved in no labor dispute; that its building was being picketed by members of defendants' Janitor's Union who by coercion and intimidation prevented other business concerns from transacting business with plaintiff, and plaintiff prayed that defendants be enjoined from doing the acts and things complained of.

Defendants answered the complaint, averring there was a labor dispute between the parties, admitting that the building was picketed by members of the defendant Union and denying all wrongful acts of coercion and intimidation. The case was referred to a master in chancery who took the evidence, made his report finding that no illegal acts were committed by defendants and recommending that the suit be dismissed for want of equity. Objections and exceptions to the report were overruled, a decree entered in accordance with the recommendation of the master, and plaintiff appeals.

The record discloses that in 1936 and for some time prior thereto plaintiff employed a janitor to do the ordinary work around the building, and there is evidence that he was discharged March

[illegible]

[illegible]

[illegible]

17, 1936, on account of inefficiency, as claimed by plaintiff; while on the other hand there is evidence to the effect that he would not perform certain duties, claiming they did not properly belong to the function of a janitor; that afterward there was correspondence between the parties, the defendants seeking to have a union janitor employed, while plaintiff's position was that a janitor was not needed because in the meantime it had installed an automatic stoker, the use of which rendered a great part of the janitor work unnecessary. Attached to the verified complaint was the affidavit of Eleanore Vickery, in which she swore she was regularly employed by plaintiff corporation "as a janitress or housekeeper;" that the building was equipped with an automatic stoker and incinerator in which the tenants deposited their garbage; that she was entirely satisfied with her compensation and working conditions, and that there was no labor dispute. On the hearing Mrs. Vickery testified that the building used about 15 tons of coal a month during the coldest weather and that she shoveled the coal into the stoker.

Plaintiff's position is - and it offered evidence to that effect - that after the automatic stoker was installed it employed a houseman "who in addition to the inconsequential time in firing the automatic stoker, was employed in cleaning the building, or as a maintenance man"; that about 16 months after the janitor was discharged a representative of defendants took the matter up with plaintiff with a view to having a union janitor employed to work at the building, and said that if Mr. Vickery, the houseman then employed at the building, continued to do the janitor work he would be required to join the union at an initiation fee of $212, and that unless this were done defendants' union would cause the building to be picketed; that June 21, 1937, the union representative wrote plaintiff that the union had entered into an agreement with the

17, 1936, on account of inefficiency, as claimed by plaintiff; while on the other hand there is evidence to the effect that he would not perform certain duties, claiming they did not properly belong to the function of a janitor; that afterward there was correspondence between the parties, the defendants seeking to have a union janitor employed, while plaintiff's position was that a janitor was not needed because in the meantime it had installed an automatic stoker, the use of which rendered a great part of the janitor work unnecessary. Attached to the verified complaint was the affidavit of Eleanore Vickery, in which she swore she was regularly employed by plaintiff as janitress "as a janitress or housekeeper" that the building was equipped with an automatic stoker and incinerator in which the tenants deposited their garbage; that she was entirely satisfied with her compensation and working conditions, and that there was no labor dispute. On the hearing Mrs. Vickery testified that the building used about 15 tons of coal a month during the coldest weather and that she shoveled the coal into the stoker.

Plaintiff's position is - and it offered evidence to that effect - that after the automatic stoker was installed it employed a housemen "who in addition to the inconsequential time in firing the automatic stoker, was employed in cleaning the building, or as a maintenance man"; that about 16 months after the janitor was discharged a representative of defendants took the matter up with plaintiff with a view to having a union janitor employed to work at the building, and said that Mr. Vickery, the housemen then employed at the building, continued to do the janitor work he would be required to join the union at an initiation fee of $250, and that unless this were done defendants' union would cause the building to be picketed; that June 22, 1937, the union representative wrote plaintiff that the union had entered into an agreement with the

Chicago Real Estate Board, which agreement specified that all buildings operated by anyone other than the owner must have the services of a union janitor, and sought to have plaintiff employ a union janitor.

Plaintiff also offered evidence to show that about July, 1937, a picket was sent to the building, who was later joined by another picket; that they walked up and down in the rear of the building bearing a placard on which was printed, "This building unfair to organized labor. Chicago Flat Janitor's Union, Local Number 1 A. F. L."; and that they stated to persons who sought to make deliveries and to do business with plaintiff's building that plaintiff was unfair to union labor.

Mrs. Vickery testified that on one occasion Burns, the picket, ran into the building, grabbed a workman by the arm and prevented the removal of ashes, and said he would call out his gang and clean up the situation; that on another occasion Robert McLeod, business agent of the union, threatened William Vickery, who worked part time at the building as maintenance man and part time as janitor, saying that unless the union's demand was met by hiring a union janitor the place would be bombed.

The picket, Burns, called by defendants, testified that he was sent to the building as a picket July 30, 1937, wearing a banner on which were printed words to the effect that the building was unfair to union labor. He denied he had threatened anyone at the building; testified that he had talked to a number of persons who came to deliver laundry and other supplies to the building and told them of the dispute, and that these men being union men refused thereafter to deliver to the building.

McLeod, called by defendants, testified he was business agent for the defendants for 11 years; that it was reported there was a non-union janitor working on plaintiff's building; that he

Chicago Real Estate Board, which agreement specified that all buildings operated by anyone other than the owner must have the services of a union janitor, and sought to have plaintiff employ a union janitor.

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Mrs. Vianery testified that on one occasion Anna, the picket, ran into the building, grabbed a woman by the arm and prevented the removal of boxes, and said he would call out his gang and clean up the situation; that on another occasion Robert Redeed, business agent of the union, threatened Gilles Vianery, who worked part time at the building as maintenance man and part time as janitor, saying that unless the union's demand was met by hiring a union janitor the place would be bombed.

The picket, Anna, called by defendants, testified that he was sent to the building as a picket July 30, 1937, wearing a banner on which were printed words to the effect that the building was unfair to union labor. He denied he had threatened anyone at the building; testified that he had talked to a number of persons who came to deliver laundry and other supplies to the building and told them of the dispute, and that these men being union men refused thereafter to deliver to the building.

Redeed, called by defendants, testified he was business agent for the defendants for 11 years; that it was reported there was a nonunion janitor working on plaintiff's building; that he

went to the building, saw Mrs. Vickery and later her husband, Mr. Vickery, came in; that the witness asked him if he had a union card and Vickery answered, "No." He denied forcing his way into the Vickery apartment or that he made any threats.

There is other evidence to the effect that on one occasion the police were called to the building and found Burns and the other picket in the alley, drew their guns, arrested them and took them to the police station, but no complaint was lodged against them when the facts were explained.

Considerable other evidence offered by plaintiff is in the record tending to show that the pickets and other representatives of defendants' union used threats and intimidation to prevent delivery of goods to the building or the removal of ashes, etc. On the other side the evidence is to the effect that no such threats or intimidation were indulged in by the pickets or anyone else.

We will not detail the evidence further. The master went into the facts somewhat in detail, finding in substance that plaintiff had failed to sustain its claim of threats and intimidation by a preponderance of the evidence. The picketing was admitted but defendants claimed it was peaceful and therefore ought not to be enjoined, because of par. 2a, sec. 1, chap. 48, Ill. Rev. Stats. 1937. The master saw and heard the witnesses testify; his finding was approved by the chancellor. In these circumstances we are not authorized under the law to disturb the finding unless we are of opinion that it is against the manifest weight of the evidence. Pasedach v. Auw, 364 Ill. 491; Stasch v. Stasch, 355 Ill. 581; Kosakowski v. Bagdon, 369 Ill. 252.

Upon a careful consideration of all the evidence we are unable to say that the decree of the court is against the manifest weight of the evidence. The finding of the master and of the chancellor was that the picketing and persuasion were peaceful and lawful, and since

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We will not detail the evidence further. The master went into the facts somewhat in detail, finding in substance that plaintiff had failed to sustain its claim of threats and intimidation by a preponderance of the evidence. The picketing was admitted but defendants claimed it was peaceful and therefore ought not to be enjoined, because of par. 8a, sec. 1, chap. 48, Ill. Rev. Stat. 1937. The master saw and heard the witnesses testify; his finding was approved by the chancellor. In these circumstances we are not authorized under the law to disturb the finding unless we are of opinion that it is against the manifest weight of the evidence. Paddock v. Ann, 364 Ill. 491; Stone v. Stone, 388 Ill. 382; Kozelovski v. Jordan, 368 Ill. 399.

Upon a careful consideration of all the evidence we are unable to say that the decree of the court is against the manifest weight of the evidence. The finding of the master and of the chancellor was that the picketing and pickets were peaceful and lawful, and since

the passage by the legislature in 1925 of section 1, par. 2a, chap. 48, Ill. Rev. Stats. 1937 [Jones Ill. Stats. Ann. 106.21] such picketing and persuasion are not to be enjoined. This is the holding of our Supreme court in Fenske Bros. v. Upholsterers' Union, 358 Ill. 239.

Counsel for plaintiff in their reply brief say, "Interference with customers, interference with persons with whom plaintiff had contracts, was the basis of the complaint. Throughout the hearing plaintiff was willing, and is now willing, to permit all the picketing defendants desire, if they will confine themselves to the front of the building and give vent to the advertising campaign, but contends the defendants' actions were, no matter what the defendants call it, a boycott." We think it obvious that picketing in front of the building would serve little or no purpose for the reason that apparently all deliveries were made in the rear and not in the front of the building.

We are also of opinion that the primary purpose of the picketing was not to establish a boycott and injure plaintiff, as it contends, but on the contrary the building was picketed in an endeavor to benefit defendants' union and its members.

Complaint is also made that the court erred in excluding evidence offered by plaintiff to the effect that some of the drivers of trucks who came to deliver goods to or receive goods from the building told an employee of plaintiff what the picket had said to such drivers. Some of this evidence was on objection ruled out as being hearsay. We think the point made is not of importance in view of the fact that a number of drivers were called who testified in substance that when they were advised by the pickets of the union's complaint they refused to go to the building afterward for the purpose of receiving or delivering goods because they were union men, and under their union rules ought not to "run" a picket line. And it is shown that afterward some deliveries were not made because

the passage by the legislature in 1893 of section 1, par. 6a, ch. 47, Ill. Ann. Stat. 1927, when placing the possession are not to be enjoined. This is the holding of our Supreme Court in Pierce Bros. v. Chicago Teamsters' Union, 287 Ill. 249.

Counsel for plaintiff in error cite Pierce Bros., "interference with customers, interference with persons for whom plaintiff had contracts, was the basis of the complaint. Throughout the hearing plaintiff was willing, and is now willing, to permit all the picketing defendants desire, if they will confine themselves to the front of the building and give rest to the advertising complained, but contends the defendants' actions were, no matter what the defendants call it, a boycott." We think it obvious that picketing in front of the building would serve little or no purpose for the reason that apparently all deliveries were made in the rear and not in the front of the building.

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Complaint is also made that the court erred in excluding evidence offered by plaintiff to the effect that some of the drivers of trucks who came in direct proximity to the picketing, the building told an employee of plaintiff what the pickets had said to such drivers. Some of this evidence was objection raised out as being hearsay. We think the point made is not of importance in view of the fact that a number of drivers were called who testified in substance that what they were advised by the members of the union's picketing committee was to the following effect: "Don't the pickets of demanding of satisfaction people because were going, and cause their right supplies to "boycott" a million time, and it is shown that different some deliveries were not made because

to do so would be a violation of the rules of the union to which the men belonged.

For the reasons stated the decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

to do so would be a violation of the rights of the union to which the men belonged.

For the reasons stated the decree of the Superior Court of Cook County is affirmed.

McSurely, P. J., and Latchwell, J., concur.

40953

BOND STORES, INC., a corporation,
Appellee,

v.

THE CHICAGOAN, INC., a corporation,
HOTEL CHICAGOAN CATERING CO., a
corporation,
Appellants.

ALBERT MARTIN, INC., a corporation.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

305 I.A. 487

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in forcible detainer to recover additional space in a building located at 65-69 W. Madison Street in Chicago, defendants made a motion to strike which was denied, and plaintiff a motion for summary judgment which was allowed, and defendants appeal.

The rights of the parties are based on certain leases and agreements attached to the affidavit for judgment, none of which are not denied in the affidavit submitted in behalf of defendants.

It appears that December 17, 1929, the Noir Hotel Company demised certain space in this building to Illinois Bond Stores, Inc. The hotel assigned this lease to another corporation known as 65 West Madison Street Building Corporation. The assignee made a supplementary agreement in writing with Illinois Bond Stores, Inc., whereby the space of the lessee was enlarged to include all the third floor of the building with the exception of sample rooms on the north side of it and corridors leading to it. This agreement also provided that the lessee might further enlarge this space so as to include all the third floor upon 30 days written notice to the lessor to enter into an appropriate agreement covering the additional space.

On the same day the lessor (65 West Madison Street Building Corporation) entered into a supplementary agreement in writing with the Savoy Building Corporation which held a prior lease. By this supplementary agreement it was provided that the Savoy Building Cor-

In an action in forcible detainer to recover additional space in a building located at 64-66 W. Madison street in Chicago, defendants made a motion to strike which was denied, and plaintiff a motion for summary judgment which was allowed, and defendants appeal.

The rights of the parties are based on certain leases and agreements attached to the affidavit for judgment, terms of which are not denied in the affidavit submitted in behalf of defendants.

It appears that December 17, 1919, the Sair Total Company desired certain space in this building to Illinois Bond Stores, Inc. The hotel assigned this lease to another corporation known as 66 West Madison Street Building Corporation. The assignee made a supplementary agreement in writing with Illinois Bond Stores, Inc., whereby the space of the lease was enlarged to include all the third floor of the building with the exception of sample room on the north side of it and corridors leading to it. This agreement also provided that the lessee might further enlarge this space so as to include all the third floor upon 30 days written notice to the lessor to enter into an appropriate agreement covering the additional space.

On the same day the lessor (66 West Madison Street Building Corporation) entered into a supplementary agreement in writing with

poration would yield up promptly this additional space on the third floor than under lease to it, if Illinois Bond Stores, Inc. should at any time become entitled to take this additional space under its agreement of the same date with the lessor. Savoy Hotel afterwards changed its name to the Chicagoan, Inc., and on April 6, 1937, Illinois Bond Stores, Inc. assigned all its right, title and interest under its lease and agreements with reference to these premises to plaintiff.

December 27, 1937, plaintiff served a written notice on 65 West Madison Street Building Corporation, requesting this additional space and requesting the corporation to execute an appropriate agreement as provided. On September 19, 1938, the Building Corporation, as lessor, demised to plaintiff the additional space pursuant to this agreement of December 31, 1936. On October 10, 1938, plaintiff made a written demand on the defendant, Chicagoan, for the possession of the premises which was refused, and January 9, 1939, this suit was filed. The other defendants are sub-tenants of the Hotel Chicago, Inc.

The agreement of December 31, 1936, between 65 West Madison Street Building Corporation and Illinois Bond Stores, Inc. recited: "It is contemplated by the parties hereto that the Lessee may hereafter require an enlargement of its space on said third story for merchandising purposes. In the lease between the Lessor and Savoy Hotel Corporation covering the hotel portion of said building the Lessor has reserved the right to withdraw from the hotel tenant such additional space on the third story of said building as might be hereafter granted to the Lessee pursuant to this amendment. The Lessor agrees that it will within thirty (30) days after the receipt of a written request from the Lessee enter into an appropriate agreement, in which all of the parties hereto shall join, further enlarging the demised space so as to include all of said third story with the exception of such space as is taken for building elevators and other utilities. Said agreement shall ex-

portion would yield up promptly this additional space on the third floor then under lease to it, if Illinois Road Stores, Inc. should at any time become entitled to take this additional space under its agreement of the same date with the lessor. Davis Total Advertising Company (?) came to the Dirksgoon, Inc., and on April 6, 1937, Illinois Road Stores, Inc. assigned all its right, title and interest under its lease and agreements with reference to these premises to plaintiff.

December 27, 1937, plaintiff served a written notice on the Hall Building Corporation, requesting this additional space and requesting the corporation to execute an appropriate agreement as provided. On September 23, 1938, the building corporation, as lessor, demised to plaintiff the additional space pursuant to this agreement of December 21, 1938. On October 10, 1938, plaintiff made a written demand on the defendant, Chicagoan, for the possession of the premises which was returned, and January 7, 1939, this suit was filed. The other defendants are sub-tenants of the Hotel Chicago, Inc.

The agreement of December 21, 1938, between the Hall Building Corporation and Illinois Road Stores, Inc. recited: "It is contemplated by the parties hereto that the lessee may hereafter require an enlargement of its space on said third floor for merchandising purposes. In the lease between the lessor and Davy Hotel Corporation covering the hotel portion of said building the lessor has reserved the right to withdraw from the hotel tenant such additional space on the third story of said building as might be hereafter granted to the lessee pursuant to this amendment. The lessor agrees that it will within thirty (30) days after the receipt of a written request from the lessee enter into an appropriate agreement, in which all of the parties hereto shall join, further enlarging the demised space so as to include all of said third story with the exception of such space as is then or shall

pressly preserve all of the covenants and agreements contained in said Lease as heretofore and hereby amended * * *."

By the lease of December 31, 1936, to the Savoy Hotel Corporation, as lessee, after reciting the provisions of the lease to Illinois Bond Stores, Inc., section 2 of the lease recites. "The Lessee acknowledges that it is familiar with said Bond Stores lease as now amended and with the provisions of said further amendment thereto to be executed at or about the time of the execution of this indenture referred to in Article First hereof. The Lessee agrees to afford the said Bond Stores, as lessee under said Bond Stores lease, as amended as aforesaid, the following rights and services as specified and defined in said Bond Stores lease as now or hereafter amended: * * *." Section 4 recites: "The Lessee covenants that if said Bond Stores should at any time hereafter become entitled to take the additional space on the third story of said building, pursuant to said amendment referred to in Article First hereof, to be executed at or about the time of the execution of this indenture, the Lessee will promptly yield up possession of said additional space and afford said Bond Stores reasonable facilities for accomplishing any suitable or appropriate revisions in or alterations of said additional space."

The defendant, Chicagoan, Inc., says defendants are in possession not as mere tenants at will but held under a lease which demised the premises for a term of thirty years. It argues that defendants have the right to question the option granted to plaintiff by plaintiff's lessor. It is said that the right of plaintiff to exercise the option is conditioned upon plaintiff's requirements and needs; that no particular form of language or technical words are required to create such a condition precedent, and that strict compliance with the terms and conditions was necessary; that it was necessary for plaintiff to aver in its complaint and to prove upon the trial an actual bona fide intention to use the premises for the stipulated purpose, and that plaintiff's lessor could not waive this

hereby preserve all of the covenants and agreements contained in said lease as herein and herein recited = + ".

By the lease of December 31, 1958, to the Savoy Hotel Corporation, as lessee, after recited the provisions of the lease to Illinois Bond Store, Inc., section 2 of the lease recites, "The lessee acknowledges that it is familiar with said Bond Stores lease as now amended and with the provisions of said further amendment thereto to be executed at or about the time of the execution of this instrument referred to in Article First hereof. The lessee agrees to afford the said Bond Stores, as lessee under said Bond Stores lease, as amended or aforesaid, the following rights and services as specified and defined in said Bond Stores lease as now or hereafter amended: " " ", " section 4 recites: "The lessee covenants that if said Bond Stores should at any time hereafter become entitled to take the additional space on the third story of said building, pursuant to said amendment referred to in Article First hereof, to be executed at or about the time of the execution of this indenture, the lessee will promptly yield up possession of said additional space and afford said Bond Stores reasonable facilities for accessibility and suitable or appropriate revisions in or alterations of said additional space."

The defendant, Chicagoan, Inc., says defendants are in possession not as mere tenants at will but hold under a lease which designed the premises for a term of thirty years. It argues that defendants have the right to question the option granted to plaintiff by plaintiff's lessor. It is said that the right of plaintiff to exercise the option is conditioned upon plaintiff's compliance and mode; that no particular form of instrument or technical words are required to create such a condition precedent, and that strict compliance with the terms and conditions was necessary; that it was necessary for plaintiff to have in its possession and to press upon the total or partial Bond Store Stores to use the premises for the

condition precedent for defendants; that the contracts and agreements, first, between plaintiff and plaintiff's lessor, and secondly, between plaintiff's lessor and defendants, were made on the same day and relate to the same subject matter, were known to all the parties and were executed for a common purpose. Therefore, it is argued, these must be construed together.

Defendant says it is a direct beneficiary of the limitations imposed on the option of plaintiff for the disputed space, and that the contract between plaintiff and its lessor was for the benefit of defendants, and that defendants are, therefore, entitled to have its provisions enforced; that the complaint was insufficient in failing to allege that the additional space was needed by plaintiff for merchandising purposes, and that, as a matter of law, when a right of action depends upon the performance of an antecedent condition or the existence of an antecedent fact, a complainant must aver the existence of the fact or performance of the condition. It is said this proposition of law is applicable to a complaint in forcible detainer; that pleadings are to be construed strictly against the pleader, and assuming the law to be as set forth, the evidenciary facts as disclosed by the affidavits in support of and against summary judgment are insufficient, and that there was an issue of fact for the court or jury as to whether plaintiff in fact "required" the additional space for merchandising purposes or whether it needed the additional space at all. The affidavit submitted in behalf of defendant denied that the additional space was needed by plaintiff for merchandising purposes and denied that plaintiff intended to use it for that purpose, and averred that its request for the additional space was not made in good faith. As evidence of this the affidavit states that authorized agents of plaintiff stated to agents of defendants that plaintiff did not intend to use the space for merchandising purposes and, as a matter of fact, some time in the future intended to use it for other purposes.

If the law applicable is as stated by defendants, we think

condition precedent for defendant; that the contracts and agreements, first, between plaintiff and plaintiff's lessor, and secondly, between plaintiff's lessor and defendants, were made on the same day and relate to the same subject matter, were known to all the parties and were executed for a common purpose. Therefore, it is argued, these must be construed together.

Defendant says it is a direct breach of the limitations imposed on the option of plaintiff for the disputed space, and that the contracts between plaintiff and its lessor and for the benefit of defendants, and that defendants are, therefore, entitled to have its provisions enforced; that the complaint was insufficient in failing to allege that the additional space was needed by plaintiff for merchandising purposes, and that, as a matter of law, when a right of action depends upon the performance of an antecedent condition or the existence of an antecedent fact, a complaint must aver the existence of the fact or performance of the condition. It is said this proposition of law is applicable to a complaint in foreign detainer; that pleadings are to be construed strictly against the pleader; and assuming the law to be as set forth, the evidence must be disclosed by the affidavits in support of and against summary judgment are insufficient, and that there was an issue of fact for the court or jury as to whether plaintiff in fact "wanted" the additional space for merchandising purposes or whether it needed the additional space at all. The affidavit submitted in behalf of defendant denied that the additional space was needed by plaintiff for merchandising purposes and denied that plaintiff intended to use it for that purpose, and averred that its request for the additional space was not made in good faith. As evidence of this the affidavit states that authorized agents of plaintiff stated to agents of defendants that plaintiff did not intend to use the space for merchandising purposes and, as a matter of fact, none was in the future intended to use it for other purposes.

it would follow that the affidavits disclose an issue of fact. However, we do not agree that the agreements can be interpreted according to defendant's contention. There was no agreement or contract between plaintiff and any one of the defendants. There was no contractual relationship between them. The agreement of December 31, 1936, between plaintiff and its lessor was not for the benefit of defendants. The Chicagoan, Inc. in its lease of December 31, 1936, acknowledged that it had notice of the agreement between plaintiff and plaintiff's lessor under which plaintiff had the right to request and obtain additional space, this space being part of that which was leased to the Chicagoan, Inc. By the terms of the agreement between plaintiff's lessor and the defendants, defendant bound itself to yield up possession of the additional space if and when plaintiff became entitled to it under the agreement between plaintiff and its lessor. The use which plaintiff might make of the additional space was a matter wholly immaterial in so far as defendant is concerned. The condition of the option was not that plaintiff <u>might need or require the space</u> but that plaintiff should notify its lessor and <u>obtain from it an agreement for the leasing of such additional space</u>. This was the condition precedent and the only one in so far as this defendant is concerned. Plaintiff's lessor is not a party to this proceeding. The option was from plaintiff's lessor to plaintiff, and while the contract recited the circumstances which might in the future cause plaintiff to exercise its option, that circumstance was not made the condition upon which the lease of the additional space was to be executed. Under the plain terms of defendant's contract with the lessor <u>defendant</u> agreed to surrender the additional space upon the execution of a lease thereof by its lessor to the plaintiff, and upon the execution of such lease to plaintiff, plaintiff became entitled to the possession of these premises. The affidavit for defendant tenders an immaterial issue.

We have no quarrel with the law as cited in defendant's

it would follow that the affidavits disclose an issue of fact. However, we do not agree that the agreements can be interpreted according to defendant's contention. There was no agreement or contract between plaintiff and any one of the defendants. There was no contractual relationship between them. The agreement of December 21, 1956, between plaintiff and its lessor was not for the benefit of defendants. The Chicagoan, Inc. in its issue of December 21, 1956, acknowledged that it had notice of the agreement between plaintiff and plaintiff's lessor under which plaintiff had the right to request and obtain additional space, this space being part of that which was leased to the Chicagoan, Inc. By the terms of the agreement between plaintiff's lessor and the defendants, defendants could itself to yield up possession of the additional space if and when plaintiff became entitled to it under the agreement between plaintiff and its lessor. The use which plaintiff might make of the additional space was a matter wholly immaterial in so far as defendant is concerned. The condition of the option was not that plaintiff might seek or receive the space but that plaintiff should notify its lessor and obtain from it an agreement for the leasing of such additional space. This was the condition precedent and the only one in so far as this defendant is concerned. Plaintiff's lessor is not a party to this proceeding. The option was from plaintiff's lessor to plaintiff, and while the contract peeled the circumstances which might in the future cause plaintiff to exercise its option, that circumstances was not made the condition upon which the lease of the additional space was to be executed. Under the plain terms of defendant's contract with the lessor defendant agreed to surrender the additional space upon the exercise of a lease thereof by its lessor to the plaintiff, and upon the execution of such lease to plaintiff, plaintiff became entitled to the possession of those premises. The affidavit for defendant tendered an immaterial issue.

brief and elaborately argued by it with citation of more than one hundred and seventy-five authorities. The law is elementary. The undisputed facts show that it is not applicable.

The purpose of a summary proceeding is that the court may determine where there is any issue of fact to be tried. If we understand the law applicable it appears here there is no issue of fact. Chicago Title & Trust Co. v. Cohen, 284 Ill. App. 181, 197; Spry v. Chicago Ry. Equipment Co., 298 Ill. App. 471, 475; Roberts v. Sauerman Bros., Inc., 300 Ill. App. 212, 217. Defendant says, however, that forcible detainer was not available to plaintiff; that its proper remedy was either by suit at law for damages on the covenant or by suit in equity for specific performance. Defendant is mistaken. Summary judgment may properly be entered in a forcible detainer action. Wainscott v. Penikoff, 287 Ill. App. 78. Plaintiff could maintain its suit for possession under the Forcible Detainer Statute. §2, par. 4, Chap. 57, Ill. State Bar Stats. 1939, p. 1713. Personal Home Mortgage Co. v. Seegrin, 275 Ill. App. 419; West Side Trust & Savings Bank v. Lopoten, 348 Ill. 631, 636; Wainscott v. Penikoff, 287 Ill. App. 78; Goldblatt Bros. v. Hofeld, Inc., 284 Ill. App. 31, 37.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor and McSurely, JJ., concur.

brief and elaborately argued by it with citation of more than one hundred and seventy-five authorities. The law is elementary. The undisputed facts show that it is not applicable.

The purpose of a summary proceeding is that the court may determine where there is any issue of fact to be tried. If we understand the law applicable it appears here there is no issue of fact. Gleason Title & Trust Co. v. Sabin, 204 III. App. 149, 157; Hoyt v. Gaines Co., 204 III. App. 471, 472; Ashwood v. Lawson Corp., Inc., 241 III. App. 514, 517. Statement part. However, that forcible detainer was not available to plaintiff; that its remedy was either by suit at law for damages on the covenant or by suit in equity for specific performance. Defendant is mistaken. Summary judgment may properly be entered in a forcible detainer action. Hayward v. Trudell, 207 III. App. 77. Plaintiff could maintain its suit for possession under the forcible detainer statute. 21 Am. Jur. 2d Ejm. 27, 121. Chap. Par Stats. 1957, p. 1212. Fraternal Home Workers Co. v. Geurin, 278 III. App. 419; Lock Side Trust & Savings Bank v. Lorton, 260 III. 231, 234; Hayward v. Trudell, 207 III. App. 77; Mitchell Bros. v. Leafield Inc., 294 III. App. 21, 27.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

Lorner and Schwartz, JJ., concur.

41079

WILLARD L. LAUER, Administrator of the Estate of Samuel C. Lauer, Deceased,

Appellee,

v.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

305 I.A. 487

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action under the statute for wrongful death, upon trial by jury there was a verdict for plaintiff with damages of $7500, on which judgment was entered. This is a companion case to General No. 40919 by the administrator of the estate of Lila L. Lauer, in which an opinion has been this day filed.

The Lauers, husband and wife, died as a result of injuries sustained November 20, 1937, when the automobile in which they were riding was struck by one of defendant's cars which was being pushed east on tracks which intersected Euclid avenue, a public highway running north and south in the City of Chicago Heights in Cook county. The material facts are the same in both cases, but for convenience we restate these facts here.

" *** The accident in which these two lost their lives occurred November 20, 1937, at about 8:00 P.M. They were riding in an Oldsmobile automobile, which Mr. Lauer was driving. Euclid avenue was paved. It was crossed at right angles by defendant's right-of-way on which there are six tracks 71 feet wide from the northernmost to the southernmost rail. Pictures are in evidence showing the situation at the crossing at the time of the accident. On the west side of the street, 6 feet north of the northernmost track and 23 feet to the west of the west line of the avenue, was a small shanty used by a flagman. Fifty feet to the west of this was a small latrine building. Thirteen feet north of the northerly track and 5 feet west of the street was a cross-arm bearing the

In an action under the statute for wrongful death, upon trial by jury there was a verdict for plaintiff; the judge of [illegible], on which judgment was entered. This is a continuation case to General No. 40212 by the administrator of the estate of Ella L. Lanier in which an opinion has been this day filed.

The Lanier, husband and wife, died as a result of injuries sustained November 21, 1937, when the automobile in which they were riding was struck by one of defendant's cars which was being pushed out on tracks which intersected Smith street, a public highway running north and south in the City of Chicago Heights in Cook County. The material facts are the same in both cases, but for convenience we restate their facts here.

At the accident in which they lost their lives [illegible] 20, 1937, at about 8:00 P.M. They were riding in an [illegible] automobile, which Mr. Lanier was driving. Smith street was paved. It was crossed at right angles by defendant's right-of-way on which there are six tracks 7 feet wide from the northbound to the southbound rail. Pictures are in evidence showing the situation at the crossing at the time of the accident. On the west side of the street, 8 feet north of the northbound track and 23 feet to the west of the west line of the street, was a small shanty used by a flagman. Fifty feet to the west of this was a small latrine building. Thirteen feet north of the northerly

words "Railway Crossing." About 150 feet north of the track was a round sign bearing the letters "S. S." Thirteen feet north of the crossing and 5 feet east of the highway was a street light. This was the only light within 200 feet of the crossing. Euclid avenue was designated as a through street by the proper authorities. Stop signs were posted at every intersecting street. There was no light of any kind on the crossing or on the west side of the street. The pavement of Euclid avenue was 24 feet wide at this place. The trains of defendant ran over the two inner tracks. The outside tracks were used for storage purposes. West of the flagman's shanty was a stone and wire fence. There was evidence from which the jury might believe that on the night of the accident a train of railroad cars was standing on the north track to the west of the crossing. If this was true, these would tend to obscure the vision of travelers approaching from the north. The flagman was not on duty at this time. There was no wig-wag or moving signal of any kind maintained by defendant at the crossing. There was no light in the cross-arm and no light on the crossing at all so far as the railroad was concerned. The only artificial light was the one already described on the east side of the avenue. There had been snow in the morning and the pavement was slippery.

"Herndon, the rear brakeman, who was the only occurrence witness and who was called to testify by both plaintiff and defendant, said the moon was shining, but other evidence indicated it was dark at the time. Herndon had been employed by defendant for about twenty-two years. The crew in charge of defendant's train consisted of Herndon, another brakeman, a conductor, and engineer and a fireman. The train consisted of about eight cars which had been picked up at Joliet. The car farthest to the east in the train was a gondola car, and the engine was pushing this and the seven other cars east across the intersection. Herndon says he was sitting on the southeast corner of the gondola car, which he thinks was empty. He had an electric lantern such as he used in giving signals to the

marks "Railway Crossing," about 150 feet north of the track was a round sign bearing the letters "A. S." Thirteen feet north of the crossing and 8 feet east of the highway was a street light. This was the only light within 200 feet of the crossing. Euclid avenue was designated as a through street by the proper authorities. Stop signs were posted at every intersecting street. There was no light of any kind on the crossing or on the west side of the street. The pavement of Euclid avenue was 24 feet wide at this place. The trains of defendant ran over the two inner tracks. The outside tracks were used for storage purposes. West of the flagman's shanty was a stone and wire fence. There was railroad fog which the jury might believe that on the night of the accident a train of railroad cars was standing on the north track to the west of the crossing. If this was true, there would tend to obscure the vision of travelers approaching from the north. The flagman was not on duty at this time. There was no wig-wag or moving signal of any kind maintained by defendant at the crossing. There was no light in the stone-house and no light on the crossing at all so far as the railroad was concerned. The only artificial light was the one already described on the east side of the avenue. There had been snow in the morning and the pavement was slippery.

Therefore, the jury decided, and was the only proper verdict and who was called to testify by both plaintiff and defendant, said the moon was shining, but other evidence indicated it was dark at the time. Harrison had been employed by defendant for about twenty-two years. The crew in charge of defendant's train consisted of Harrison, another brakeman, a conductor, and engineer and a fireman. The train consisted of about eight cars which had been placed up at Joliet. The car furthest to the east in the train was a gondola car, and the engine was pushing this and the seven other cars east across the intersection. Witnesses were in the habit of the railroad company of the gondola car, which he thinks was empty.

engineer and others of the crew. There was no other light on the gondola. He was on the top, about 10 or 12 feet from the ground. The engine which was pushing the train of cars had electric headlights in front and also an electric headlight on the rear. It was a road type of engine. The crew had run around other cars right west of the crossing so as to get these particular cars ahead of them and deliver the same to the C. & E. I., which was about three-quarters of a mile east of where the accident happened. There was a box car in the train which was higher than the gondola. The other brakeman on the train rode on the car just behind the gondola. These cars were from 40 to 50 feet in length, so the front end of the engine which was pushing from the rear was about 400 feet from where Herndon was riding. The train was moving on the fourth track from the north. Herndon says that it was moving about 8 or 10 miles an hour. He first saw the automobile coming south at a speed of about 35 miles an hour when the front end of his train was about 150 feet west from the crossing. The automobile, he says, was then 300 to 400 feet to the north. The headlights of the automobile were lighted. He says the whistle of the train was blowing. He heard the whistle and saw the automobile practically at the same time. When about 50 to 75 feet from the crossing he swung his lantern out across it as far as he could reach out from the car, leaning forward. He swung it east and west in the same direction the train was going. He did not get down from the car onto the ground, and no one was on the ground signaling. The lantern was an electric with two bulbs. It was produced in this court on oral argument. Each bulb is about one-quarter of an inch in diameter. Only one of these was lighted. When the train was about 12 feet from the crossing he gave the first signal to the engineer. The automobile did not stop. He felt the engineer apply the air brakes and the train stopped about 120 to 130 feet from the point at which he gave the signal. The draw bar or coupling of the gondola car hit the auto-

engineer and others of the crew. There was no other light on the pandola. He was on the log, about 20 or 12 feet from the ground. The engine which was pushing the train of cars had electric headlights in front and also an electric headlight on the rear. It was a road type of engine. The crew had run around other cars right west of the crossing so as to get these particular cars ahead of them and deliver the same to the C. & N. I., which was about thirty-seven of a mile west of where the accident happened. There was a box car in the train which was higher than the pandola. The other brakemen on the train rode on the car just behind the pandola. These cars were from 40 to 50 feet in length, so the front end of the engine which was pushing from the rear was about 100 feet from where Burnham was riding. The train was moving on the fourth track from the north. Burnham says that it was moving about 8 or 12 miles an hour. He first saw the automobile coming south at a speed of about 50 miles an hour when the front end of his train was about 150 feet west from the crossing. The automobile, he says, was then 300 to 400 feet to the north. The headlights of the automobile were lighted. He says the whistle of the train was blowing. He heard the whistle and saw the automobile practically at the same time. When about 50 to 75 feet from the crossing he swung his lantern out across it as far as he could reach out from the car, leaning forward. He swung it west and west in the same direction the train was going. He did not get down from the car onto the ground, and no one was on the ground signalling. The lantern was an electric with two bulbs. It was produced in this court as evidence. Each bulb is about one-quarter of an inch in diameter. Only one of them was lighted. When the train was about 12 feet from the crossing he gave the first signal to the engineer. The automobile did not stop. In fact the engineer saw the air brakes and the train stopped about 120 to 140 feet from the point at which he gave the signal. The draw bar or coupling of the pandola car hit the auto-

mobile right in the center and carried it over the crossing. The occupants were rendered unconscious and died shortly thereafter."

At the close of all the evidence defendant made a motion for an instructed verdict in its favor, which was denied, and it is argued in this court that the instruction should have been given because defendant was not negligent in protecting the crossing nor in the operation of its train, and because Mr. Lauer was guilty of contributory negligence. In case No. 40919, we have held that so far as protection of the crossing and the operation of the train were concerned the question of the negligence of the defendant was properly submitted to the jury. The crossing as maintained was unusually dangerous and the jury could properly find that defendant was negligent in failing to have a flagman at the crossing at the time of the accident and in failing to see that reasonably safe lights and signals were maintained there. We think, too, the question of whether there was negligence in the operation of the train was also for the jury. We have so held in the companion case, and the examination of the evidence in this case does not persuade us to a different conclusion. See Opp v. Pryor, 294 Ill. 538.

The question of the contributory negligence of Mr. Lauer presents a question different from that we decided in the other case. Mr. Lauer was driving the automobile and was in control of it. If there was negligence in driving it it was his negligence. As in the other case so here, Goodman v. C. & N. I. Ry. Co., 240 Ill. 126; Morgan v. Rockford, R. & J. Ry. Co., 251 Ill. App. 127; Greenwald v. Baltimore & O. R. Co., 332 Ill. 527; and Provenzano v. Ill. Cent. R. R. Co., 257 Ill. 192, are cited and relied on. According to the cases, it was for the plaintiff in the first instance to produce some evidence tending to show ordinary care on the part of Mr. Lauer. There was an eyewitness, and no evidence was offered or received as to the habits of the deceased with reference to care. The evidence shows that at the time of the accident Mr. Lauer was forty-nine years of age. He was in good health; his eyesight was good. The evidence

media right in the center and carried it over the crossing. The occupants were rendered unconscious and died shortly thereafter."

At the close of all the evidence defendant made a motion for an instructed verdict in its favor, which was denied, and it is argued in this court that the instruction should have been given because defendant was not negligent in permitting the operation of the operation of its train, and because Mr. Lamar was guilty of contributory negligence. In case No. 4928, we have held that so far as protection of the crossing and the operation of the train were concerned the question of the negligence of the defendant was properly submitted to the jury. The evidence as mentioned was unusually dangerous and the jury could properly find that defendant was negligent in failing to have a flagman at the crossing at the time of the accident and in failing to see that reasonably safe lights and signals were maintained there. We think, too, the question of whether there was negligence in the operation of the train was also for the jury. We have so held in the companion case, and the consideration of the evidence in this case does not permit us to a different conclusion. See Cox v. Lykes, 98 Fla. 828.

The question of the contributory negligence of Mr. Lamar presents a question different from that we decided in the other case. Mr. Lamar was driving the automobile and was in control of it. If there was negligence in driving it it was his negligence. As in the other case we have, Gordon v. C. B. & Q. Ry. Co., 338 Ill. 159; Thomas v. Indiana, D. & W. Ry. Co., 225 Ill. 62; Greenwald v. Baltimore & O. R. Co., 252 Ill. 267; and Pratt v. Ill. Cent. R. R. Co., 247 Ill. 158, are cited and relied on. According to the cases, it was for the plaintiff in the first instance to produce some evidence showing by some ordinary care on the part of Mr. Lamar. There was no eyewitness, and no evidence was offered or received as to the habits of the deceased with reference to care. The evidence shows that at the time of the accident Mr. Lamar was forty-nine years

also tends to show he was driving the automobile south on Euclid avenue at the speed of about 25 to 30 miles per hour. The jury could conclude that such speed indicated due care on his part. Defendant says that police officers could see the cars on the crossing when at a distance of 150 feet. The inference is that Mr. Lauer should have seen them. This is unfair since at the time the officers viewed the scene of the accident the train of cars was parked across the street and at a standstill. The headlight on the engine (unlike the situation when Mr. Lauer approached the crossing) made the train visible. Also, there was a spotlight on the squad car of the policemen as they approached. The lantern used by Herndon in his attempt to warn the approaching automobile, as we have already said, had a small electric bulb, and there was evidence from which the jury might well have believed that it would not have been seen by Mr. Lauer under the circumstances in the exercise of due care. Herndon says it was moonlight, but this was contradicted and seems improbable. Herndon gives no evidence tending to show negligence on the part of Mr. Lauer,with the exception that he kept on driving toward the crossing at a moderate rate of speed notwithstanding the approaching train. It is apparent Lauer was looking ahead of him, and if he had seen the train it is fair to presume he would have stopped. The cases are all to the effect that the question of contributory negligence, under such circumstances, is for the jury. A railroad crossing is, of course, known to be dangerous by every person of experience. The cases say one approaching a crossing should look and listen, but the cases also say that it is not at all times and under all circumstances negligent not to do so. Here all the circumstances as to the physical situation at the crossing, the condition of the weather, the location of the train, etc. must be taken into consideration. The following cases justify a holding that the question of Lauer's contributory negligence, if any, was for the jury: Lannon v. City of Chicago, 189 Ill. App. 595; C. & E. I. Ry. Co. v. Beaver, 199 Ill. 34; Lundquist v. Chicago Rys. Co.,

also tends to show he was driving the automobile south on Lucile avenue at the speed of about 30 to 35 miles per hour. The jury could conclude that such speed indicated due care on his part. Defendant says that police officers could see the cars on the crossing when at a distance of 150 feet. The inference is that Mr. Lamar should have seen them. This is merely alone at the time the officers viewed the scene of the accident the train of cars was passing across the street and at a standstill. The headlight on the engine lighted the situation when Mr. Lamar approached the crossing; but the train visible. Also, there was a headlight on the equal bar of the policemen as they approached. The lantern used by Lemmon in his attempt to warn the approaching automobile, as we have already said, had a small electric bulb, and there was evidence from which the jury might well have believed that it would not have been seen by Mr. Lamar under the circumstances in the exercise of due care. Besides were it was moonlight, yet this was sentimental and very improbable. Herndon gives no evidence tending to show negligence on the part of Mr. Lamar, with the exception that he kept on driving toward the crossing at a moderate rate of speed notwithstanding the approaching train. It is apparent Lamar was looking ahead of him, and if he had seen the train it is fair to presume he would have stopped. The cases are all to the effect that the question of contributory negligence, under such circumstances, is for the jury. A railroad crossing is, of course, known to be dangerous by every person of experience. The cases say one approaching a crossing should look and listen, but the cases also say that it is not at all times and under all circumstances negligent not to do so. Here all the circumstances as to the physical situation at the crossing, the condition of the weather, the location of the train, etc. must be taken into consideration. The following cases justify a holding that the question of Lamar's contributory negligence, if any, was for the jury: Lemmon v. City of Quincy, 120 Ill. App. 8001 S. W.

305 Ill. 108; Peters v. Chicago Rys. Co., 307 Ill. 302; Henry v. C. C. C. & St. L. Ry. Co., 236 Ill. 210; Coulter v. I. C. R. R. Co., 264 Ill. 414; Taylor v. Alton & Eastern R. R. Co., 258 Ill. App. 292; Oswald v. Grand Trunk Western Ry. Co., 283 Ill. App. 86.

It is further contended that the court erred in modifying defendant's requested instruction No. 6. This instruction after stating the rule of law applicable to contributory negligence contained this further sentence ---'The natural instinct of self-preservation does not give rise to any presumption that the deceased was using due care and caution for his own safety.' The court refused to give the instruction as tendered and modified it by striking out this last sentence then gave it as modified. The defendant argues that as there was an eyewitness to the accident (the brakeman, Herndon), the presumption of due care did not obtain and cites Goodman v. Chicago & N. I. Ry. Co., 248 Ill. App. 193; Devine v. Chicago City Ry. Co., 188 Ill. App. 358, 359; and Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 305, 310. Defendant says there was no evidence whatever of the habits of the deceased as to prudence or the exercise of care and caution in the ordinary affairs of life or any other fact throwing light upon his exercise of ordinary care at the time of the accident, and that there was, therefore, no basis in the record upon which the presumption of due care arising from the natural instinct of self-preservation could be based. As a matter of fact, in no place in the trial of this cause, so far as the record discloses, did plaintiff contend or rely on any presumption of due care arising from the natural instinct of self-preservation. No such rule was contained in any instruction given at plaintiff's request, and this matter, in so far as it is in the record, is injected by the objection made to the deletion of this sentence from the instruction.

In instruction No. 13, given at the request of plaintiff, the jury was clearly told that while the law did not require of plaintiff's intestate an extraordinary degree of care for his own

308 Ill. 108; Yetman v. Chicago Ins. Co., 307 Ill. 308; Lowry v. C. C. C. & St. L. Ry. Co., 294 Ill. 194; Smith v. C. C. C. & St. L. Ry. Co., 288 Ill. 414; Taylor v. Alton & Eastern R. R. Co., 288 Ill. 290; Ismald v. Grand Trunk Western Ry. Co., 287 Ill. 490, 494.

It is further contended that the court erred in modifying defendant's requested instruction No. 6. This instruction after stating the rule of the applicable to contributory negligence contained this further sentence ---"The mere fact of self-preservation does not give rise to any presumption that the deceased was making due care and caution for his own safety." The court refused to give the instruction as tendered and modified it by striking out this last sentence then gave it as modified. The defendant argues that as there was no eyewitness to the accident (the deceased, Herndon), the presumption of due care did not obtain and cites Gordon v. Chicago & E. I. Ry. Co., 241 Ill. 190, 195; Peters v. Illinois City Ry. Co., 180 Ill. App. 580, 582; and Powell v. C. C. C. & St. L. Ry. Co., 221 Ill. 508, 510. Defendant says there was no evidence whatever of the habits of the deceased as to prudence or the exercise of care and caution in the ordinary affairs of life or any other fact throwing light upon his exercise of ordinary care at the time of the accident, and that there was, therefore, no basis in the record upon which the presumption of due care arising from the natural instinct of self-preservation could be based. As a matter of fact, in its place in the brief of this cause, so far as the tendered discussion, did plaintiff contend or rely on any presumption of due care arising from the natural instinct of self-preservation. No such rule was contained in any instruction given at plaintiff's request, and this matter, in so far as it is in the record, is injected by the objection made to the deletion of this sentence from the instruction.

In instruction No. 15, given at the request of plaintiff, the jury was clearly told that while the law did not require of

safety, it was required of him and his next-of-kin that at and before the time of the injury ordinary care should be exercised in view of all the facts and circumstances shown by the proof, and that what was ordinary care would depend upon the circumstances of each particular case, that it was such care as a person of ordinary prudence would exercise under the same or similar circumstances. In other words, plaintiff tried the case upon the theory that it was incumbent upon him to prove the exercise of ordinary care by the deceased. We hold the court did not err in so modifying this instruction.

It is urged that the court erred in its ruling upon the admission and rejection of evidence and in particular that it was error to admit in evidence Exhibits 1, 2 and 3, being photographs of the railroad crossing at which the accident occurred. There was testimony before the same were admitted as to each and every one of them that it was a correct, adequate and proper representation of the place where the accident occurred, and this by several witnesses. The claim agent of defendant, who had been familiar with the crossing for twenty years and who testified, made no statement tending in any way to show that the photographs were not fair representations of the physical situation at the crossing when the accident occurred. There was no error in this respect. Brownlie v. Brownlie, 357 Ill. 117; People v. Herbert, 361 Ill. 64.

Over the objection of defendant the court received in evidence a certified copy of the weather report of the Weather Bureau of Chicago for the month of November, 1937, from which plaintiff read to the jury information shown on the report for the day of the accident, November 20, 1937. Defendant objected that the report of the Weather Bureau at Chicago was inadmissible to prove weather conditions in Chicago Heights, twenty-seven miles away, and now contends that the court erred in allowing the same in evidence, citing Randfelder v. East Side Levee District, 194 Ill. App. 262, where records of the Weather Bureau of St. Louis, Missouri, were held

safety, it was required of him and his co-plaintiff that at and before the time of the injury ordinary care should be exercised in view of all the facts and circumstances shown by the proof, and that what was ordinary care would depend upon the circumstances of each particular case. That it was such care as a person of ordinary prudence would exercise under the same or similar circumstances. In other words, plaintiff tried the case upon the theory that it was incumbent upon him to prove the exercise of ordinary care by the deceased. We hold the court did not err in so modifying this instruction.

It is urged that the court erred in its ruling upon the admission and rejection of evidence and in particular that it was error to admit in evidence Exhibits 1, 2 and 3, being photographs of the railroad crossing at which the accident occurred. There was testimony before the jury which established as to each and every one of them that it was a correct, adequate and proper representation of the place where the accident occurred, and this by several witnesses. The claim appears of defendant, who had been familiar with the crossing for twenty years and who testified, made no statement tending in any way to show that the photographs were not fair representations of the physical situation at the crossing when the accident occurred. There was no error in this respect. Kennedy v. Kennedy, 287 Ill. 117; Pennsylvania v. Hughes, 201 Ill. 64.

Over the objection of defendant the court received in evidence a certified copy of the weather report of the weather bureau of Chicago for the month of November, 1927, from which plaintiff had at the jury instructions shown at the request for the day of the accident, November 30, 1927. Defendant objected that the report of the weather bureau at Chicago was inadmissible to prove weather conditions in Chicago Heights, twenty-seven miles away, and now contends that the court erred in allowing the same in evidence, citing Hardigree v. East Side Lumber Distributor, 184 Ill. App. 502,

inadmissible to prove conditions in Madison county, Illinois. There was positive evidence by Mr. Baker, a police officer of Chicago Heights, to the effect that on the night of the accident the pavement was icy and the night cloudy. We think the evidence was admissible as tending to show the state of the weather on that day. Chicago & Northwestern Ry. Co. v. Trayes, 17 Ill. App. 156. The Handfelder case, on which defendant relies, is only abstracted but it is apparent from the abstract that the issue in that case concerned the quantity of water, which at the time in question was being drained from the land from a remote point of the county, and the Appellate court held that the St. Louis weather report was not competent proof as to the particular quantity of water falling in the City of East St. Louis, Illinois. We hold the court did not err in the admission of this evidence.

It is contended the court erred in admitting testimony as to cars which at the time in question were in and about the crossing but not attached to the train which the engine was pushing. Defendant objected upon the ground that if the purpose of this evidence was to bring out the fact that other cars standing on adjacent tracks would obstruct the view of the crossing to one approaching from the north, there was no allegation of negligence in this respect in the complaint, and Buckley v. Mandel Bros., 332 Ill. 368, 372; Miller v. C. & N. W. Ry. Co., 347 Ill. 487, 492, with Anderson v. C. M. I. & P. Ry. Co., 243 Ill. App. 327, and Urban v. Pere Marquette Ry. Co., 206 Ill. App. 182, are cited. The evidence was admissible for the purpose of showing the general situation at the crossing although not particularly alleged as negligence in the complaint. C. & E. I. Ry. Co. v. Weaver, 199 Ill. 34.

It is urged here, as in the companion case, that the damages awarded to plaintiff are excessive. As we pointed out in that case, however, where there are lineal descendants the law

inadmissible to prove conditions in Madison county, Illinois. There was positive evidence by Dr. Ashby, a police officer of Chicago Heights, to the effect that on the night of the accident the pavement was dry and the night clear. In spite the evidence was admissible as tending to show the state of the weather on that day, Chicago & Northwestern Ry. Co. v. Dunny, 17 Ill. App. 1?5. The Hamilton case, on which defendant relies, is only distinguished in it appeared from the abstract that the issue in that case concerned the quantity of water, which at the time in question was being drained from the land from a sewer built of the county, and the Appellate Court held that the Ill. Local Weather Report was not competent proof as to the particular quantity of water falling in the city of East St. Louis, Illinois. In both the court did not err in the admission of this evidence.

It is contended the court erred in admitting testimony as to sure which at the time in question were in and about the crossing but not attached to the train which the engine was pushing. Defendant objected upon the ground that if the purpose of this evidence was to bring out the fact that other cars standing on adjacent tracks would obstruct the view of the crossing to one approaching from the north, there was no allegation of negligence in this respect in the complaint, and Dunlap v. Wabash Ryw., 208 Ill. 7?8, 1?1; Miller v. C. & A. R. Co., 147 Ill. 4?7, 480, with Anderson v. C. C. I. & L. Ry. Co., 248 Ill. 4?2, 477, and Lyons v. Illinois Cent. Ry. Co., 248 Ill. 4?4, 1?8, are cited. The evidence was admissible for the purpose of showing the general situation at the crossing although not particularly alleged as negligence in the complaint. C. & E. I. R. R. Co. v. Dunny, 128 Ill. 34.

It is urged here, as in the commission case, that the damages awarded to plaintiff are excessive. As we pointed out in the case, however, where there are illegal decisions the law

presumes pecuniary loss from the fact of death. Gilcox v. Ellis, 320 Ill. 271; Dukeman v. C. C. C. & St. L. R. R. Co., 277 Ill. 104.

We find no reversible error in the record, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor and McNurely, JJ., concur.

premature penalties here from the fear of death. Allgood v. Allgood, 208 Ill. 297; Dickerson v. R. C. A. M. L. R. Co., 207 Ill. 176.

We find no reversible error in the record, and the judgment will be affirmed.

AFFIRMED.

Alderson and Dougherty, JJ., concur.

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LAURA S. K. SLOCUM, A. JOHN and MERWIN M. HART,
Appellants,

v.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, M. N. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware corporation,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

305 I.A. 488

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

September 7, 1938, plaintiffs filed their complaint charging defendants with conspiracy and fraud in connection with the handling of bonds evidencing mortgage indebtedness on certain real estate and asking for an accounting and other relief; the matter was referred to a master who took evidence and reported, recommending that the amended complaint filed February 1, 1939, be dismissed; the chancellor approved the report and sustained the motions to dismiss, and plaintiffs appeal.

The Ashland Industries Building Corporation on January 1, 1926, issued its first mortgage 6 per cent bonds in the principal sum of $1,500,000. These bonds were secured by a trust deed from the Ashland corporation and Maurice Rothschild, one of the defendants, to The Foreman Trust and Savings Bank, as trustee, conveying real estate properties and pledging 3456 shares of $100 par value preferred stock of Harris Brothers Company, a Delaware corporation; the trust deed provided a sinking fund to be used for the retirement of these bonds; they were also secured by a guaranty agreement executed by Maurice Rothschild and four other guarantors (two of whom are now dead). This agreement guaranteed the payment of the principal and

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

September 7, 1934, plaintiffs filed their respective complaints against defendants with conspiracy and fraud in connection with the handling of bonds evidencing mortgage indebtedness on certain real estate and asking for an accounting and other relief; the matter was referred to a master who took evidence and reported, recommending that the amended complaint filed February 1, 1935, be dismissed; the chancellor approved the report and sustained the motions to dismiss, and plaintiffs appeal.

The Ashland Industries Building Corporation on January 1, 1926, issued its first mortgage 6 per cent bonds in the principal sum of $1,300,000. These bonds were secured by a trust deed from the Ashland corporation and Maurice Rothschild, one of the defendants, to The Foreman Trust and Savings Bank, as trustee, conveying real estate properties and pledging 8666 shares of $100 par value preferred stock of Marvin Brothers Company, a Delaware corporation; the trust deed provided a sinking fund to be used for the retirement of these bonds; they were also secured by a guaranty agreement executed by Maurice Rothschild and four other guarantors (two of whom are now dead). This agreement guaranteed the payment of the principal and

interest on the bonds, upon the condition that whenever the principal amount of bonds outstanding was reduced to $1,000,000 all liabilities under the guaranty were terminated and the guarantors discharged. The Foreman bank, as trustee, was later replaced by defendant First National Bank of Chicago. The bond issue was reduced by payments to $1,143,200. January 1, 1932, there was a default in the payment of interest and also defaults in the payment of taxes for the years 1928 to 1936, inclusive.

A bondholders' committee was formed to handle the situation under an agreement dated December 31, 1931, and approximately 90 per cent of the outstanding bonds were deposited with this committee; January, 1936, pursuant to the request of the committee, the First National Bank, as trustee, offered for sale at public auction the Harris Brothers Company stock pledged under the trust deed, which was purchased by the committee for $2500 and the proceeds distributed to or held for the bondholders. In 1936, proceedings to reorganize the Ashland Industries Building Corporation were instituted under Section 77B of the Bankruptcy Act in the Federal Court for the Northern District of Illinois, and a plan of reorganization was submitted and confirmed in that proceeding on August 2, 1938. At the request of the committee and because of the pendency of the reorganization proceedings, the First National Bank, as trustee, refrained from instituting proceedings against the guarantors. Maurice Rothschild, one of the guarantors, offered to the trustee $143,200 of outstanding Ashland bonds on condition that they be canceled and the guarantors released. The trustee refused this offer because of an ambiguity in the provisions of the trust deed and the guaranty agreement with reference to the trustee's powers and authority to accept this offer. In 1938, pending the reorganization proceedings, the Security National Bank of Sheboygan, owner of $9000 of the bonds, demanded that the First National Bank, as trustee, institute legal proceedings against the guarantors. This demand was refused by the trustee.

interest on the bonds, upon the condition that whenever the principal amount of bonds outstanding was reduced to $1,000,000 all liabilities under the guaranty were terminated and the guarantors discharged. The Pocoman bank, as trustee, was later replaced by Detroiteast First National Bank of Chicago. The bond issue was reduced by payments to $1,140,000. January 1, 1932, there was a default in the payment of interest and also default in the payment of taxes for the years 1928 to 1930, inclusive.

A bondholders' committee was formed to handle the situation under an agreement dated December 21, 1931, and approximately 90 per cent of the outstanding bonds were deposited with this committee; January, 1932, pursuant to the request of the committee, the First National Bank, as trustee, offered for sale at public auction the Earle Brothers Company stock pledged under the trust deed, which was purchased by the committee for $2000 and the proceeds distributed to or held for the bondholders. In 1932, proceedings to reorganize the Ashford Industries Building Corporation were instituted under Section 77B of the bankruptcy act in the Federal Court for the Northern District of Illinois, and a plan of reorganization was submitted and confirmed in that proceeding on August 2, 1933. At the request of the committee and because of the pendency of the reorganization proceedings, the First National Bank, as trustee, refrained from instituting proceedings against the guarantors. Meanwhile Mathematic, one of the guarantors, offered to the trustee $143,000 of outstanding Ashland bonds on condition that they be cancelled and the guarantors released. The trustee refused this offer because of a doubt in the provisions of the trust deed and the guaranty agreement with reference to the trustee's power and authority to accept this offer. In 1934, pending the reorganization proceedings, the Security National Bank of Kingsport, owner of $2000 of the bonds, demanded that the First National Bank, as trustee, institute legal proceedings against the guarantors. This demand was refused by the trustee.

May 25, 1938, the Sheboygan bank brought suit in the Superior court of Cook county against the three surviving guarantors and the First National Bank, as trustee, seeking a money judgment against the guarantors and an order enjoining the trustee from accepting the tender by Maurice Rothschild: the trustee filed its answer to this; subsequently, and before hearing, the Sheboygan bank filed its amended complaint, reciting that since the commencement of the original proceeding it had investigated the financial condition of the guarantors and now believed it to be for the best interest of all concerned that Rothschild's tender be accepted, and asked for an order directing the First National Bank, as trustee, to accept this offer, cancel the bonds and execute a release to the guarantors. The Sheboygan bank was a non-depositing bondholder and its suit was a class suit; its amended complaint set forth the bond issue, the guaranty, the financial condition of the guarantors, the Rothschild tender and the ambiguities touching the authority of the trustee in the trust deed and guaranty agreement. Plaintiffs say this was the result of a "secret deal" and part of a scheme that the Sheboygan bank would "about face." An answer was filed by the First National Bank, as trustee, asking for directions of the court. The other defendants also answered, including the bondholders' committee, recommending acceptance of the Rothschild tender.

August 8, 1938, a decree was entered finding that the acceptance of this tender was for the best interest of all the bondholders; that the trustee had authority to accept it, cancel the bonds offered and release the guarantors, and the decree directed that this be done.

September 7, 1938, the original complaint in the present case was filed by plaintiffs Flocum and Cohn, asking that the decree of August 8th be set aside, and also asking an accounting and a money judgment against the guarantors and that the sale of the Harris Brothers stock be set aside; this complaint, on motion, was stricken.

February 1, 1939, the present amended complaint was filed,

May 26, 1920, the Shoshoyan bank brought suit in the superior court of Cook county against the three surviving guarantors and the First National Bank, as trustee, seeking a money judgment against the guarantors and an order enjoining the trustee from accepting the tender by Kantzler Rothschild; the trustee filed its answer in that chancery, and before hearing, the Shoshoyan bank filed its amended complaint, recalling that since the commencement of the original proceeding it had investigated the financial condition of the guarantors and now believed it to be for the best interest of all concerned that Rothschild's tender be accepted, and asked for an order directing the First National Bank, as trustee, to accept this offer, cancel the bonds and execute a release to the guarantors. The Shoshoyan bank was a non-participating bondholder and did not join with the initial complaint and from the bond issue, the guaranty, the financial condition of the guarantors, the Rothschild tender and the exhaustive inquiry the authority of the trustee in the trust deed and guaranty agreement. Plaintiffs say this was the result of a "secret deal" and part of a scheme that the Shoshoyan bank would "shoot down." An answer was filed by the First National Bank, as trustee, asking for directions of the court. The other defendants also answered, including the bondholders' committee, recommending acceptance of the Rothschild tender.

August 6, 1926, a decree was entered finding that the acceptance of this tender was for the best interest of all the bondholders; that the trustee had authority to accept it, cancel the bonds offered and release the guarantors, and the decree directed that this be done.

September 7, 1926, the original complaint in the present case was filed by plaintiffs Steen and Cohn, asking that the decree of August 6th be set aside, and also asking an accounting and a money judgment against the guarantors and that the suit of the Harris brothers also be set aside; this complaint, or motion, was dismissed.

February 1, 1928, the present amended complaint was filed

asking that the decree of August 8, 1938, be declared null and void, that the trustee and the members of the bondholders' committee be removed and held for malfeasance and misfeasance and that a money judgment be entered against the surviving guarantors. Defendants filed motions to strike, which were sustained, the trial court apparently being of the opinion that all the matters set up in the amended complaint had already been heard and decided by two courts prior to the institution of the present proceedings.

Plaintiff Slocum is the owner of $2000 of the bonds: plaintiff Cohn owns $800 of the bonds, and they did not deposit their bonds with the committee; plaintiff Hart deposited his bonds, aggregating $1200. Plaintiff Slocum had brought suit against Rothschild for the non-payment of the interest, and on September 27, 1937, had judgment against Rothschild for $684.1[illegible], which was affirmed by the Appellate court in Slocum v. Harris, 306 Ill. App. 367, and leave to appeal denied by the Supreme court.

Plaintiffs attack the sale by the trustee of the Harris Brothers stock pledged under the trust deed to the bondholders' committee for $2800; this stock was sold at public auction and the proceeds applied on account of or held for outstanding bonds. The amended complaint contains no allegations as to the actual value of the stock or that the sale price was less than the value or that the trustee was without power to sell. Moreover, this sale was fully described in the Federal court reorganization proceedings and after evidence before a master and hearing by the court the sale was confirmed. All questions with reference to the action of the trustee in connection with the Harris Brothers Company stock were finally determined in the Federal court, and its conclusion is a bar to the plaintiffs' claim in this respect.

The amended complaint charged fraud in accepting the tender of Rothschild of $143,200 of bonds and releasing the guarantors. The guaranty agreement provides that upon payment by any guarantor of any amount pursuant to the guaranty agreement he became entitled to a

making that the decree of August 9, 1938, be declared null and void, that the trustee and the members of the bondholders' committee be removed and held for malfeasance and misfeasance and that a money judgment be entered against the surviving guarantors. Defendants filed motions to strike, which were sustained, the trial court expressly taking of the opinion that all the matters set up in the amended complaint had already been heard and decided by the courts prior to the institution of the present proceedings.

Plaintiff Kleven is the owner of $8000 of the bonds; plaintiff John owns $800 of the bonds, and they did not deposit their bonds with the committee; plaintiff Hurt deposited his bonds, aggregating $1000. Plaintiff Kleven had brought suit against Rothschild for the non-payment of the interest, and on September 27, 1937, had judgment against Rothschild for $4884.18, which was affirmed by the Appellate court in Kleven v. Harris, 294 Ill. App. 282, and leave to appeal denied by the Supreme court.

Plaintiffs attack the sale by the trustee of the Harris Brothers stock pledged under the trust deed to the bondholders' committee for $2000; this stock was sold at public auction and the proceeds applied on account of or held for outstanding bonds. The amended complaint contains no allegations as to the actual value of the stock or that the sale price was less than the value or that the trustee was without power to sell. However, this sale was fully described in the federal court reorganization proceedings and after evidence before a master and hearing by the court the sale was confirmed. All questions with reference to the action of the trustee in connection with the Harris Brothers Company stock were finally determined in the federal court, and its conclusion is a bar to the plaintiffs' claim in this respect.

The Rothschild charged fraud in accepting the senior of Rothschild's $145,000 of bonds and releasing the guarantors. The plaintiff alleges partials that were defaulted by not guarantors of any amount current to the necessary assessment be deemed entitled to a

lien on the trust estate to the extent of such payment, but subordinate to the lien of the bondholders. Rothschild had acquired $143,200 of bonds and tendered them for cancelation in order to reduce the mortgage indebtedness to $1,000,000. If this offer was accepted Rothschild would become a creditor of the mortgage debtor, but subordinate to the claims of the bondholders. It was while the question of the authority of the trustee to accept this tender was pending in the Federal court that the Sheboygan bank filed its suit asking for a money judgment against the guarantors and for an order enjoining the trustee from accepting Rothschild's offer. The bondholders' committee filed its petition in the Federal court asking its authority to appear in the state court proceeding and to agree to the compromise offered by Rothschild. This was referred in the Federal court to a master and evidence was introduced as to the financial condition of the guarantors. The master found that Pascal Harris, one of the guarantors, had died in 1930 and his estate had been settled before there was any default in the mortgage under consideration; that D. C. Harris, another guarantor, had died in 1937, leaving no assets other than insurance payable to his family; that the committee was unable to find any assets of A. Harris, another guarantor, and that G. H. Haum, another guarantor, had small assets and large liabilities; that the only one of these guarantors with assets was Rothschild, who had large liabilities, and that suit against him would probably result in bankruptcy. The master reported, recommending that the committee accept Rothschild's tender, and it was so ordered. There is no evidence of fraud or conspiracy, but the order was entered only after careful consideration.

Plaintiffs next complain that the decree of the Superior court of August 8, 1938, is no bar to this action, as that decree was procured by fraud and collusion. The Sheboygan bank's amended complaint was filed on behalf of all bondholders and asserted that after an investigation of the financial condition of the guarantors

lien on the trust estate to the extent of such payments, but subordinate to the lien of the bondholders. Orthodoxia had acquired $140,000 of bonds and tendered them for cancellation in order to reduce the mortgage indebtedness to $1,000,000. If this offer was accepted Orthodoxia would become a creditor of the mortgage debtor, but subordinate to the claims of the bondholders. It was while the question of the validity of the trustee to accept this tender was pending in the Federal court that the Shakespeare Bank filed its suit asking for a money judgment against the guarantors and for an order satisfying the trustee from accepting Orthodoxia's offer. The bondholders' committee filed its petition in the Federal court asking its authority to enjoin the trustee from accepting Orthodoxia and to sue on the guarantees filed by Orthodoxia. This was referred in the Federal court to a master and evidence was introduced as to the financial condition of the guarantors. The entire total issued bonds, one of the guarantors, had died in 1928 and his estate had been initiated before there was any default in the mortgage under the allegation that G. G. Harris, another guarantor, had died in 1930, leaving no assets other than insurance payable to his wife; that the committee was unable to find any assets of G. Harris, another guarantor, and that G. G. Cone, another guarantor, had small assets and large liabilities; that the only one of these guarantors with assets was Orthodoxia, who had large liabilities, and that suit against his would prejudice priority in bankruptcy. The master reported, recommending that the committee accept Orthodoxia's tender, and it was so ordered. There is no evidence of fraud or conspiracy, but the order was entered only after careful deliberation.

Plaintiffs next complain that the decree of the Superior Court of August 8, 1930, is wrong in this action, as that decree was procured by fraud and collusion. The Shakespeare Bank's amended complaint was filed on behalf of all bondholders and asserted that after an investigation of the financial condition of the guarantors

it was the opinion that Rothschild's tender should be accepted. A decree to this end was entered in the Superior court, Rothschild's bonds were accepted and the guarantors released. It appears that both Hart and Blocum knew of the pendency of these proceedings; neither, however, made any attempt to vacate the decree or appeal from it; Hart, as a depositing bondholder, was represented by the committee. The decree in the Superior court was not a consent decree but was entered after plaintiff had investigated the situation, and upon the hearing the decree was entered. The Superior court found in its decree that the suit was brought as a class suit and that all parties were represented. Plaintiffs, as we have said, neither moved to vacate or appeal.

No facts are shown supporting the charges of fraud and collusion. It is too well settled to require extended citation of authority that mere conclusions as to fraud are not sufficient, but that facts must be shown. Harrison v. County of Peoria, 267 Ill. 36; Krause v. Chicago Title & Trust Co., 266 Ill. 568; Plank v. Plank, 303 Ill. 254. The Superior court had jurisdiction of the Sheboygan bank suit. All parties were in court and were represented by members of their respective classes and by the trustee. White v. Macqueen, 360 Ill. 236.

The instant proceedings are in the nature of a bill of review, which must be brought for error of law apparent on the face of the decree and cannot be made to function as an appeal or writ of error. Wagner v. Hoover, 318 Ill. 169.

Plaintiffs argue that there was no ambiguity in the terms of the trust deed with reference to the authority of the trustee to accept the Rothschild bonds and that the action of the trustee in this regard was improper. Examination of the trust deed (sec. 12, art. 8) shows the trustee was authorized to accept and receive in satisfaction of the mortgage debt "such amount and amounts of money as the trustee in its unlimited discretion may deem advisable." We

It was the opinion that Mackenzie's tender should be accepted. A decree to this end was entered in the Superior court, Mackenzie's bonds were accepted and the receivers released. It appears that both Hart and Flocum knew of the pendency of these proceedings; neither, however, made any attempt to vacate the decree or appeal from it; Hart, as a depositing bondholder, was represented by the committee. The decree in the Superior court was not a nullity decree but was entered after plaintiff had investigated the situation, and upon the hearing the decree was entered. The Superior court found in its decree that the suit was brought as a class suit and that all parties were represented. Validity, in the first sort, neither need be sought nor appeal.

No finds are shown supporting the charge of fraud and collusion. It is too well settled to require citation of authority that mere conclusions of to fraud are not sufficient, but that facts must be shown. Hartman v. County of Travis, 300 Ill. 34; Frank v. Chicago Title & Trust Co., 298 Ill. 491; Frank v. Frank, 300 Ill. 154. The Superior court had jurisdiction of the Washington Park suit. All parties were in court and were represented by members of their respective classes and by the trustee. Kline v. Hammond, 280 Ill. 488.

The instant proceedings are in the nature of a bill of review, which must be brought for error of law apparent on the face of the decree and cannot be made to function as an appeal or writ of error. Hamner v. Moody, 314 Ill. 182.

Plaintiffs argue that there was no ambiguity in the terms of the trust deed with reference to the authority of the trustee to accept the Kalamazoo bonds and that the action of the trustee in this regard was improper. Examination of the trust deed (see, 13, par. 3) shows the trustee was authorized to accept and receive in satisfaction of the mortgage debt "such amount and amounts of money as the trustee in its unlimited discretion may deem advisable," to

find no language specifically authorizing the trustee to accept bonds in compromise of the guaranty. A certain amount of discretion was lodged in the trustee by the terms of the trust deed, but there is no allegation that this discretion was not exercised honestly and fairly.

It is said the trustee permitted defaults in the payment of taxes, but there is no allegation that the trustee could have avoided these defaults or had any money to make such payments. There is no allegation that any more could have been realized for the bondholders if the trustee had instituted foreclosure proceedings. The committee, representing 90 per cent of the outstanding bonds, was of the opinion that acceleration and foreclosure were inadvisable. The complaint does not suggest that any greater benefits for the bondholders could have been had than was obtained by them in the reorganization accomplished in the Federal court.

Industrious and astute counsel for plaintiffs have presented a large number of points and citations which would unreasonably extend this opinion to comment upon. "It is just as important that there should be a place to end as that there should be a place to begin litigation." Stoll v. Gottlieb, 305 U.S. 165.

We have presented the affirmative reasons why, in our opinion, the orders of the Superior court sustaining the motions to strike plaintiffs' amended complaint and dismissing it were proper, and they are affirmed.

AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

find no language specifically authorizing the trustee to accept bonds in consideration of the guaranty. A certain amount of discretion was lodged in the trustee by the terms of the trust deed, but there is no allegation that this discretion was not exercised honestly and fairly.

It is said the trustee permitted defaults in the payment of taxes, but there is no allegation that the trustee could have avoided these defaults or had any money to make such payments. There is no allegation that any more could have been realized for the bondholders if the trustee had instituted foreclosure proceedings. The complaint, representing 80 per cent of the outstanding bonds, was of the opinion that acceleration and foreclosure were inadvisable. The complaint does not suggest that any greater benefits for the bondholders could have been had than was obtained by them in the reorganization accomplished in the federal court.

Industrious and able counsel for plaintiffs have presented a large number of points and citations which would unnecessarily extend this opinion to comment upon. "It is just as important that there should be a place to end as that there should be a place to begin litigation." Hull v. Hallett, 308 U.S. 148.

We have presented the affirmative reasons why, in our opinion, the orders of the Superior court sustaining the motions to strike plaintiffs' amended complaint and dismissing it were proper, and they are affirmed.

AFFIRMED.

Metzger, P.J., and O'Connor, J., concur.

40844

VERONICA M. McINERNEY, as Administratrix of the Estate of Michael J. McInerney, Deceased,

Appellant,

v.

BOYSEN BAKING COMPANY, a corporation, and EDWIN S. KELLOGG,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

305 I.A. 489

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Michael McInerney, while driving his Ford car westward in Cermak road in Chicago, collided with a truck going eastward belonging to defendant baking company and driven by the co-defendant, Edwin S. Kellogg; as a result of the collision McInerney received injuries from which he died; his administratrix brought suit against the owner of the truck and its driver, alleging that McInerney was exercising due care but that defendants' truck was so carelessly and negligently operated by Kellogg as to cause the collision; the case was tried by court and jury and a verdict was returned finding defendants not guilty; motion for a new trial was overruled and judgment entered on the verdict. Plaintiff appeals.

Plaintiff first asserts that the verdict was against the manifest weight of the evidence. The accident happened about 3 o'clock on the morning of July 14, 1937; with McInerney in his car were Arthur Ross, Andrew Hruby, Jr., and Joseph Jesko, all employees of the Link Belt Company; on the evening of July 13, they had attended a meeting of the officers and employees of this company at 53rd and Halsted streets; after the meeting, McInerney with his party first went to a downtown restaurant on Van Buren street near State, where they had something to eat; they left this place at about 3 o'clock on the morning of the 14th and proceeded homeward. They drove south on State street and were stopped by a red light at Cermak road, or 22nd street; when the green light came on they turned west on Cermak and had gone about a block - that is, opposite

Michael Delmoney, while driving his Ford car westward in Lemon road in Ottawa, collided with a truck going eastbound belonging to defendant Manley Company and driven by the co-defendant, Edwin E. Bellogg; as a result of the collision Delmoney received injuries from which he died. Administrator brought suit against the owner of the truck and its driver, alleging that Delmoney was exercising due care but that defendants' truck was so negligently and negligently operated by Bellogg as to cause the collision; the case was tried by court and jury and a verdict was returned finding defendants not guilty; motion for a new trial was overruled and judgment entered on the verdict. Plaintiff appeals.

Plaintiff first asserts that the verdict was against the manifest weight of the evidence. The accident happened about 8 o'clock on the morning of July 14, 1927; with Delmoney in his car were Arthur Lowe, Andrew Brady, Jr., and Joseph Lewis, all employees of the Link Belt Company; on the evening of July 13, they had attended a meeting of the officers and employees of this company at Ford and Elston streets; after the meeting, Delmoney with his party first went to a downtown restaurant on Van Buren street near State, where they had something to eat; they left this place at about 3 o'clock on the morning of the 14th and proceeded homeward. They drove south on State street and were stopped by a red light at Garfield road, or 52nd street; when the green light came on they turned west on Garfield and had gone about a block - that is, opposite

Dearborn street, which runs north and south, when the collision with defendants' truck, driven by Kellogg, occurred. Cermak road at this point runs east and west and is slightly over 89 feet in width; there are two street car tracks on Cermak, both of which at the time of the accident were on the north side of Cermak instead of the center.

Plaintiff makes the point that as defendants' automobile was proceeding eastward in the east bound car tracks, which were on the north side of Cermak, it violated paragraphs 181 and 182 of the Motor Vehicle law, chap. 95-1/2, Ill. Rev. Stats. 1937, which in effect says that vehicles shall be driven on the right side of the road, with certain exceptions, one of which is when the right half of the roadway is closed to traffic while under construction or repair. That was the case here. A railroad viaduct crossed Cermak about a block and a half west of the place of the collision. The pavement on the south side of Cermak road immediately east of the viaduct had been torn up, leaving the two paved portions of the street car tracks on the north side of the road the only space for traffic, and east bound traffic used the street car tracks. Defendants' truck was on the north side of Cermak road, not in violation of any provision of the Motor Vehicle law but because traffic on the south side was obstructed by pilings and trestels west of the viaduct and the torn up condition of the street east for a short block up to the street car tracks, which, as we have said, were on the north side of Cermak road next to the north curb. Moreover, counsel for plaintiff concedes that east bound traffic might proceed on the east bound car tracks. McInerney's car was proceeding westward, straddling the north rail of the west bound street car track, while defendants' automobile truck was going easterly in the east bound street car tracks.

Plaintiff's theory is that as the vehicles approached each other defendant Kellogg suddenly and negligently turned his truck in a northeasterly direction, bringing it across the path of McInerney's car, causing the vehicles to collide despite McInerney's

Dearborn street, which runs north and south, since the collision with defendants' truck, driven by Kellogg, occurred. Carmel road at this point runs east and west and is slightly over 20 feet in width; there are two street car tracks on Carmel, both of which at the time of the accident were on the north side of Carmel instead of the center.

Plaintiff makes the point that as defendants' automobile was proceeding eastward in the east bound car tracks, which were on the north side of Carmel, it violated paragraphs 126 and 128 of the Motor Vehicle Law, chap. 95-1/2, Ill. Rev. Stats. 1937, which in effect says that vehicles shall be driven on the right side of the road, with certain exceptions, one of which is when the right half of the roadway is closed to traffic while being maintained or repaired. That was the case here. A railroad viaduct crossed Carmel about a block and a half west of the place of the collision. The pavement on the south side of Carmel road immediately east of the viaduct had been torn up, leaving the two paved portions of the street car tracks on the north side of the road the only space for traffic, and also blocked traffic and the street car tracks. Defendants' truck was on the north side of Carmel road, not in violation of any provision of the Motor Vehicle Law but because traffic on the south side was obstructed by pilings and barricade west of the viaduct and the torn up condition of the street east for a short block up to the street car tracks, which, as we have said, were on the north side of Carmel road next to the north curb. However, counsel for plaintiff concedes that east bound traffic might proceed on the east bound car tracks. Kellogg's car was proceeding westward, straddling the north rail of the west bound street car track, while defendants' automobile truck was going eastward in the east bound street car tracks.

Plaintiff's theory is that as the vehicles approached each other defendant Kellogg suddenly and negligently turned his truck in a southeasterly direction, bringing it across the path of Kellogg's car, causing the vehicles to collide head-on.

efforts to avoid an accident.

Jeske testified that he was on the back seat of the car on the left hand side behind McInerney; he says defendants' truck swerved to the left, cutting right in front of McInerney's car; that McInerney also swerved to his left and then the accident occurred; he says McInerney's car was going not more than 25 miles an hour and that defendants' truck swerved in its pathway when it was between 25 or 30 feet away; that McInerney swerved to the right. When Jeske testified before the coroner's inquiry into McInerney's death a few weeks after the collision he said he could not tell how far apart the cars were when defendants' car started to swerve; that all he saw were the lights in front of him and he did not see the truck until the moment of the impact; that he could not say as to what direction McInerney swung his automobile.

Ross testified he was sitting on the back seat of McInerney's car on the right hand side and the only thing he could remember was that he saw lights in front of them at an angle, which appeared to be lights of an automobile not over 10 or 12 feet away when he saw them; that he was not paying any particular attention to McInerney's driving.

Hruby testified he was on the front seat, to the right of McInerney; that when he first saw the truck it was on the west bound rail, close to the McInerney car; that the truck suddenly made a short curve, turning to the north. At the coroner's inquest he testified he did not see the truck or its lights before the collision.

John Halver, chauffeur, an independent witness who was standing at the northeast corner of State street and Cermak road at the time of the accident said he noticed the Ford in the west bound tracks and the truck coming in the east bound tracks; that he heard the screeching of brakes; that after the collision the Ford was up against the right hand side of the truck, which was facing in a southerly direction.

efforts to avoid an accident.

Jones testified that he was on the back seat of the car on the left hand side behind McInerney; he saw Defendants' truck approach to the left, cutting right in front of McInerney's car; that McInerney also moved to his left and then the accident occurred; he says McInerney's car was going not more than 25 miles an hour and that defendants' truck swerved in its pathway when it was between 20 or 30 feet away; that McInerney moved to the right. Upon being testified before the coroner's inquiry into McInerney's death a few weeks after the collision he said he could not tell how far apart the cars were when defendants' car started to swerve; that all he saw were the lights in front of him and he did not see the truck until the moment of the impact; that he could not say as to what direction McInerney swung his automobile.

Jones testified he was sitting on the back seat of McInerney's car on the right hand side and the only thing he could remember was that he saw lights in front of them at an angle, which appeared to be lights of an automobile not over 15 or 15 feet away when he saw them; that he was not paying any particular attention to McInerney's driving.

Trudy testified he was on the front seat, to the right of McInerney; that when he first saw the truck it was on the west bound rail, close to the McInerney car; that the truck suddenly made a short turn, turning to the north. At the coroner's inquest he testified he did not see the truck or its lights before the collision.

Jack Tuiver, formerly, an independent witness who was standing at the northeast corner of State street and Grand road at the time of the accident said he noticed the Ford in the west bound tracks and the truck coming in the east bound tracks; that he heard the screeching of brakes; that after the collision the Ford was up against the right hand side of the truck, which was facing in a southerly direction.

James O'Leary, another chauffeur and independent witness, was talking to Halvor at the time; he said he heard the brakes screeching and saw the two cars come together; that when he first saw the two vehicles it looked to him as though "they were going where they belonged, one was going east and one was going west in the car tracks. The truck was going east, straddling the east bound car tracks." When O'Leary reached the scene of the accident the Ford was on the right side of the truck, "nosed into the side of the middle of the truck towards the front." Neither of these witnesses saw defendants' truck swerve towards the north, nor did they undertake to state what caused the collision.

Charles Boyle testified he was a police officer assigned to the accident prevention bureau; that he took pictures as soon as the injured parties were removed from the Ford; that these show that after the collision the rear of the truck was entirely on the north side of the west bound track; that the general direction of the truck was almost east and a little south; that there was considerable damage to the right front fender and wheel of the truck; that most of the damage to the Ford was to its right front side.

Does the record show clear and convincing evidence as to how the accident happened? The witnesses for plaintiff are indefinite. Jeske says that before the accident McInerney's car was swerving to the left, but on cross-examination said it swerved to the right; that he had a "distinct recollection" of it swerving to the right. Wruby says defendants' truck hit the Ford car "sideways" on the right hand side. Halvor says that after the collision the truck was facing in a southerly direction. O'Leary says the Ford was on the right side of the truck "nosed into the side" about the middle towards the front. Police officer Boyle took pictures of the automobiles after the collision and says these show that the rear of the truck was entirely on the north side of the west bound track and its general direction was almost east and a little south.

Under such confusing circumstances the jury could only speculate as to the cause of the collision. They could just as

Jones O'Leary, adverse claimant and independent witness, was talking to Halvor at the time; he said he heard the brakes screeching and saw the two cars come together; that when he first saw the two vehicles it looked to him as though "they were going where they belonged, one was going east and one was going west in the car tracks. The truck was going west, straddling the east bound car tracks." Then O'Leary reached the scene of the accident the Ford was on the right side of the truck, "nosed into the side of the middle of the truck towards the front." Neither of these witnesses saw defendants' truck swerve towards the north, nor did they make any to state what caused the collision.

Officer Doyle testified he was a police officer assigned to the accident investigation bureau; that he took pictures of some of the injured persons were removed from the Ford; that these show that after the collision the rear of the truck was entirely on the north side of the west bound track; that the general direction of the truck was almost east and a little south; that most damage to the right front fender and wheel of the truck; that most of the damage to the Ford was to its right front side.

Now the record show clear and convincing evidence as to how the accident happened. The witnesses for plaintiff are independent. Jones says that when the defendant truck's left was swerving to the left, but on cross-examination said it swerved to the right; that he had a "distinct recollection" of it swerving to the right. Nordy says defendants' truck hit the Ford car "sideways" on the right hand side. Halvor says that after the collision the truck was facing in a southwesty direction. O'Leary says the Ford was on the right side of the truck "nosed into the side" about the middle towards the front. Police officer Doyle took pictures of the automobiles after the collision and says these show that the rear of the truck was entirely on the north side of the west bound track and its general direction was almost east and a little south.

Under such conflicting circumstances the jury could only

reasonably conclude that if the Ford had not swerved there would have been no collision so to conclude that the swerving of the truck caused the collision. It is not within the province of the jury to guess where the truth lies and make that the foundation of a verdict. In Offutt v. Columbian Exposition, 175 Ill. 472, the opinion notes that there are cases "where there may be some evidence tending in some remote degree to support every allegation, yet of too inconclusive and unsubstantial a character to be the foundation of a verdict." In Virginia & E. R. Ry. Co. v. Hawk, 160 Fed. 348, 353, it was held that a case should never be left to a jury on a question of probabilities with a direction to find in accordance with the greater probability. "To allow a jury to dispose of a case simply upon a weighing of probabilities is to turn them loose into the field of conjecture, and to have the rights of the parties determined by guess." In Myer v. City of Janesville, 101 Wis. 371, the principle of law is properly stated. "In a case like this it is incumbent upon the plaintiff to show by evidence, with reasonable distinctness, how and why the accident occurred. *** To present two or more states of a case upon which a jury may theorize as to the real cause of the accident, putting one conjecture against another and determining which is the more reasonable, comes far short of making a case. * * * An examination of the numerous authorities cited will disclose that the principle of law does not admit of question or exception, that where there is no direct evidence of how an accident occurred, * * * it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict." We are of the opinion that in the instant case, in the absence of any convincing evidence as to whether Kellogg, driving defendants' truck, or McInerney, driving his own automobile, or both combined, brought about the accident, there can only be surmise. Courts do not mulct litigants in damages based upon guess work.

It is said that counsel for defendants was guilty of misconduct, with special reference to his argument to the jury. Upon the trial defendants' counsel had offered to place on the stand de-

reasonably conclude that if the truck had not swerved there would have been no collision as to conclude that the swerving of the truck caused the collision. It is not within the province of the jury to guess where the truck lies and make that the foundation of a verdict. In Ottati v. Independent Transit, 119 Cal. App. Supp. 1, 4, 5 (1933), the plaintiff's decedent was killed in a collision between a truck and a passenger car. The plaintiff's contention was that there was a case where there may be some evidence bearing in some remote degree to support every allegation, yet if the inconclusive and unsubstantial character to be the foundation of a verdict." In Virginia & N. Y. Co. v. Hall, 180 Fed. 882, 884, it was held that a case should never be left to a jury on a question of probabilities with a direction to find in accordance with the greater probability. "To allow a jury to dispose of a case simply upon a weighing of probabilities is to turn their issue into the field of conjecture, and to have the rights of the parties determined by guess." In Ryan v. City of Janesville, 201 Wis. 271, the principle of law is specifically stated. "In a case like this it is incumbent upon the plaintiff to show by evidence, with reasonable distinctness, how and why the accident occurred. *** To present two or more states of a case upon which a jury may speculate as to the real cause of the accident, putting one conjecture against another and determining which is the more reasonable, comes far short of making a case. * * * An examination of the numerous authorities also will disclose that the principle of law does not admit of question or otherwise, that where there is no direct evidence of how an accident occurred, * * * it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict." We are of the opinion that in the instant case, in the absence of any conflicting evidence as to whether Kelley, driving defendants' truck, or Mahoney, driving his own automobile, or both combined, brought about the accident, there can only be surmise. Courts do not make findings in damages based upon guess work.

It is said that counsel for defendants was guilty of misconduct, with special reference to his argument to the jury. Upon the trial defendants' counsel had offered to prove, by [illegible]

fendant Kellogg, driver of the truck; counsel for plaintiff objected to his competency, which objection the court properly sustained. Chap. 51, §2, Ill. Rev. Stats. 1937. In Schampon v. Speis, 285 Ill. App. 23, we noted that this was sometimes called the "Dead Man's Statute" and that Wigmore on Evidence (2nd ed.),§578, p. 1006, had said this rule of incompetency rests on "some vague metaphor in place of a reason" and asks, Can it be more important to save dead men's estates "than to save living men's estates from loss by lack of proof?"

In his argument to the jury counsel for defendants referred to the defendants' inability to present to the jury Kellogg's testimony as to how the accident happened; that he had tendered him as a witness but plaintiff's counsel had objected as he was not competent, although plaintiff might have waived this objection and permitted the jury to have full information as to the occurrence. The cases cited by plaintiff in which the conduct of opposing counsel was criticized do not present a situation like this, and we know of no rule which holds that it is reversible error for counsel to refer to the fact that his opponent has by objections, although properly sustained by the trial court, prevented the jury from knowing all of the facts.

It is suggested that a certain instruction given at the request of defendants' counsel should not have been given. The instruction properly told the jury that one of the methods of impeaching a witness was to show that he had intentionally made a statement prior to the trial inconsistent with his testimony upon the trial with respect to a material matter.

It is axiomatic that the reviewing court should only grant a new trial, when the verdict is attacked, when it is against the manifest weight of the evidence. All questions of fact were properly submitted to the jury, who saw the witnesses and heard them testify. Its conclusion was that plaintiff had failed to prove the allegations of the complaint by a preponderance of the evidence. We do not see how it can be said this conclusion is against the manifest weight of the evidence.

Faulkner Kellogg, driver of the truck; counsel for plaintiff objected to his competency, which objection the court properly sustained. Chap. 81, §§. 111. Rev. Stats. 1927. In Johnson v. Marin, 98 Ill. App. 54, we noted that this was sometimes called the "dead man's statute" and that witness on evidence (2nd ed.), §577, p. 1002, had said this rule of incompetency rests on "some vague metaphor in place of a reason" and asks, "Can it be more important to save dead man's estate than to save living man's estate from loss by lack of proof?"

In his argument to the jury counsel for defendants referred to the defendants' inability to present to the jury Kellogg's testimony as to how the accident happened; that he had described his as a witness but plaintiff's counsel had objected as he was not competent, although plaintiff might have waived this objection and permitted the jury to have full information as to the occurrence. The court asked by plaintiff in which the conduct of opposing counsel was criticized to not present a situation like this, and we know of no rule which holds that it is reversible error for counsel to refer to the fact that his opponent had by objections, although properly sustained by the trial court, prevented the jury from knowing all of the facts.

It is suggested that a certain instruction given at the request of defendants' counsel should not have been given. The instruction properly told the jury that one of the methods of impeaching a witness was to show that he had inconsistently made a statement prior to the trial inconsistent with his testimony upon the trial with respect to a material matter.

It is axiomatic that the reviewing court should only grant a new trial, when the verdict is against the manifest weight of the evidence. All questions of fact were properly submitted to the jury, who saw the witnesses and heard them testify. The conclusion was that plaintiff had failed to prove the allegations of the complaint by a preponderance of the evidence. We do not see how it can be said this conclusion is

For the reasons indicated the judgment is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., concurs.

O'Connor, J., dissenting:

In my opinion the evidence shows that the south portion of the roadway of Cermak road west of Dearborn street was torn up so that the east bound traffic was shunted to the north and could proceed east only on the south or east bound street car track. In describing the situation counsel for defendants in their brief say: "From the railroad right of way east to Federal Street (a short block) and south of the street car tracks, the asphalt pavement on Cermak Road was torn up. This all formed a sort of bottle neck, so that all vehicular traffic on Cermak Road was forced to the north side of Cermak Road from Federal Street west under the viaduct. In fact, the automobile traffic was shunted by means of traffic control lines, onto the street car tracks at about the intersection of South Dearborn Street with Cermak Road."

The accident happened about where Cermak road would be intersected by Dearborn street. McInerney, driving the automobile was straddling the north rail of the west bound track - the proper place for him to drive. The truck was being driven east, south of the tracks and swerved to the north on account of the condition of the pavement on the south side of the street, as above stated, so as to proceed east on the south street car track. When the truck swerved to the north, McInerney saw the headlights on the truck and thought there was to be a head-on collision and in an endeavor to avoid it, turned his car to the south and the driver of the truck, with the same purpose in mind, turned toward the north, but it was too late to prevent a collision.

In this state of the record, I think the verdict of the jury finding defendants not guilty is against the manifest weight of the evidence.

for the reasons indicated the judgment is affirmed.

PROSSER, JUSTICE.

WEIGHT, C.J., concurs.

SCHERER, J., dissenting:

In my opinion the evidence shows that the south portion of the roadway of Darwin road west of Washburn street was torn up so that the west bound traffic was diverted to the north and could proceed west only on the south or east bound street car track. In determining the situation counsel for defendants in their brief say: "From the railroad right of way east to Indianola street (a short block) and south of the street car tracks, the asphalt pavement on Darwin road was torn up. This all formed a sort of traffic mesh, so that all motorists travelling on Darwin road not driven in the north side of Darwin road from Indianola street west under the viaduct. In fact, the automobile traffic was routed by means of traffic control lines, onto the street car tracks at about the intersection of South Washburn street with Darwin road."

The accident happened about where Darwin road would be intersected by Washburn street. Maloney, driving the automobile was attempting the north rail of the west bound track - the proper place for him to drive. The truck was being driven east, south of the tracks and swerved to the north on account of the condition of the pavement on the south side of the street, as above stated, so as to proceed east on the south street car track. When the truck swerved to the north, Maloney saw the headlights on the truck and thought there was to be a head-on collision and in an endeavor to avoid it, turned his car to the south and the driver of the truck, who the case proves is blind, turned toward the north, but it was too late to prevent a collision.

In this state of the record, I think the verdict of the jury finding defendants not guilty is against the manifest weight of the evidence.

40841

RUSSELL A. M. ANDERSON,
Appellee,

v.

DEAN F. KLARR and LAWRENCE A. PETERSON,
Defendants.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

On Appeal of DEAN F. KLARR,
Appellant.

305 I.A. 489[2]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that on October 31, 1936, in Evanston, Illinois, defendants Klarr and Peterson assaulted him with violence and maliciously beat and wounded him; upon the trial special interrogatories were submitted to the jury asking whether each defendant, respectively, maliciously and violently assaulted and beat the plaintiff; each of these interrogatories was answered in the affirmative and both defendants were found guilty; Peterson was assessed $100 to compensate for plaintiff's damages and defendant Klarr $500; Peterson has paid his amount and defendant Klarr alone appeals.

The defense was that plaintiff negligently drove his automobile into the automobile driven by Klarr, causing it to collide with another car; that plaintiff drove his car away from the scene of the accident without giving his name or address and that Klarr pursued plaintiff for the purpose of apprehending him and turning him over to the police; that when defendant compelled plaintiff to stop his car and demanded that he return to the nearest police station, plaintiff struck Klarr and refused to go, whereupon Klarr used only such force as was necessary to arrest plaintiff and compel him to go with him to the police station in Evanston, Illinois.

The evidence presented to the jury on behalf of plaintiff was contradicted in almost every respect by that offered on behalf

of defendant. Plaintiff was 51 years old, 5 feet 5 inches tall, weighing about 165 pounds at the time of the occurrence. Defendant was 31 years old, weighing approximately 175 pounds. The altercation happened on the morning of October 31, 1936, on Sheridan road near Noyes street in Evanston; this was "homecoming" day at Northwestern University and traffic at that point was heavy; the cars were parked on both sides of the street, leaving only the two middle lanes for traffic; plaintiff had parked his car facing north on the east side of the street, in front of a group of fraternity houses and dormitories where he was to meet his cousin's son, Charles McClelland, to take him to plaintiff's home in Wilmette; after McClelland had gotten into the car plaintiff drove out into the northbound lane and says that his right rear fender grazed the left rear fender of a car parked in front of them; they proceeded northward on Sheridan at the rate of 12 to 15 miles an hour; plaintiff says this was the only accident in which he was involved.

Klarr says he was in the northbound traffic lane when plaintiff suddenly turned his car into this traffic lane without notice and struck Klarr's car, forcing it into the southbound lane and causing it to collide with a car coming from the north.

Defendant Klarr followed plaintiff, going north on Sheridan, drove his car alongside that of the plaintiff and crashed into it in an attempt to force plaintiff's car to the curb. At Isabella street - one-half to two-thirds of a mile north of Noyes - defendant forced plaintiff's car to the curb. According to plaintiff's story, corroborated by McClelland, Klarr came around to the east side of plaintiff's car, opened the door, reached inside and grabbed plaintiff by his jacket and hauled or dragged him out of the car. There is varying testimony as to what happened next, but the jury could properly believe that Klarr struck plaintiff several blows.

Plaintiff received a cut on the nose, both eyes were blackened, a cut on the forehead, a cut through the eyelid, a swollen jaw,

of defendant. Plaintiff was 23 years old, 5 feet 3 inches tall, weighing about 125 pounds at the time of the encounter. Defendant was 23 years old, weighing approximately 175 pounds. The altercation happened on the morning of October 21, 1984, on Charlotte road near Hyde street in Inverness; this was "homecoming" day at Inverness University and traffic at that point was heavy; the cars were parked on both sides of the street, leaving only the two middle lanes for traffic; plaintiff had parked his car facing north on the east side of the street, in front of a group of fraternity houses and fraternities where he was to meet his sweetie-pie, Charles Middleton, to take him to plaintiff's home in Hillsville; after meeting and getting into the car plaintiff drove out into the northbound lane and says that his right rear fender grazed the left rear fender of a car parked in front of them; they proceeded northward on Charlotte at the rate of 12 to 15 miles an hour; plaintiff says this was the only accident in which he was involved.

Flurr says he was in the northbound traffic lane when plaintiff suddenly turned his car into this traffic lane without notice and struck Flurr's car, forcing it into the southbound lane and causing it to collide with a car coming from the north.

Defendant Flurr followed plaintiff, going north on Charlotte, drove his car alongside that of the plaintiff and crowded into it in an effort to force plaintiff's car to the curb. At Isabella street - one-half to two-thirds of a mile north of Hyde - defendant forced plaintiff's car to the curb. According to plaintiff's story, unpowered by modifiedmed, Flurr came around to the east side of plaintiff's car, opened the door, reached inside and pushed plaintiff by his jacket and hauled or dragged him out of the car. There is varying testimony as to what happened next, but the jury could reasonably believe that Flurr struck plaintiff several times.

Plaintiff received a cut on the nose, both eyes were blackened, a cut on the forehead, a cut through the eyelid, a swollen jaw,

several abrasions on the jaw and cheek and a small fracture in one of the bones of the elbow. A photograph of plaintiff is in the record tending to confirm these injuries. Peterson grabbed plaintiff from behind, holding his arms, and while he was so holding plaintiff, Klarr hit him once or twice more. A doctor testified that he examined plaintiff on the day of the injuries, found him almost hysterical, with two definite, deep cuts on the head and abrasions and lesions on the face; that plaintiff was confused and excitable, and the doctor diagnosed his case as a contusion of the brain.

It is unnecessary to decide whether plaintiff was involved in a collision with another automobile, as testified to by Klarr and denied by plaintiff, or whether he was leaving the scene of an accident. Plaintiff was taken, while in this hysterical condition, to the Evanston police station where he was found guilty of leaving the scene of an accident and fined, but this is not of decisive importance in this case.

It may be admitted that a private person may arrest without a warrant for a misdemeanor committed in his presence, but neither an officer nor a private person, in attempting an arrest, may resort to excessive or unreasonable force. Klarr admits it was not necessary to inflict such injuries upon plaintiff and admits he beat plaintiff as punishment for leaving the scene of an accident. He testified, "I administered a little punishment to Anderson;" and again, that "Anderson will never forget, he will never leave the scene of an accident again."

The jury, which saw the witnesses and heard them testify, would have little trouble in arriving at the conclusion that the unprovoked assault by defendant upon the older plaintiff was unlawful and malicious. The verdict of $500 was not excessive in view of the serious nature of plaintiff's wounds.

Defendant says the court committed error in instructing the jury that although they might consider the fact of plaintiff's conviction of a traffic offense in another proceeding, such finding is

severed abrasion on the jaw and cheek and a small fracture in one of the bones of the elbow. A photograph of plaintiff in his recent condition is exhibited where injuries. Defendant grabbed plaintiff from behind, holding his arms, and while he was so holding plaintiff, Starr hit him once or twice more. A doctor testified that he examined plaintiff on the day of the injuries, found his eyes swollen, discolored, with the definite, deep cuts on the head and abrasions and lesions on the face; that plaintiff was confused and excitable, and the doctor diagnosed his case as a concussion of the brain.

It is unnecessary to decide whether plaintiff was involved in a collision with another automobile, as testified to by Starr and denied by plaintiff, or whether he was leaving the scene of an accident. Plaintiff was taken, while in this hysterical condition, to the Evanston police station where he was found guilty of leaving the scene of an accident and fined, but this is not of decisive importance in this case.

It may be admitted that a private person may arrest without a warrant for a misdemeanor committed in his presence, but neither an officer nor a private person, in effecting an arrest, may resort to excessive or unreasonable force. Starr admits it was not necessary to inflict such injuries upon plaintiff and admits he beat plaintiff as punishment for leaving the scene of an accident. He testified, "I administered a little punishment to Underwood" and again, that "Underwood will never forget, he will never leave the scene of an accident again."

The jury, which saw the witnesses and heard their testify, would have little trouble in arriving at the conclusion that the unprovoked assault by defendant upon the other plaintiff was malicious and malicious. The verdict of $500 was not excessive in view of the serious nature of plaintiff's wounds.

Defendant says the court committed error in instructing the jury that although they might consider the fact of plaintiff's non-

evidential only and not binding or conclusive as to the facts in the present case. This was a correct statement of the law.

However, all of the argument and instructions given or refused touching the alleged commission of a traffic offense by plaintiff have no bearing upon the sole question in this case, namely, Did defendant use excessive and unreasonable force in attempting to arrest plaintiff? As we have indicated, the evidence that defendant was guilty in this respect was so overwhelming as to make all other issues, by comparison, immaterial.

The jury returned the only verdict that could properly be returned, and the judgment thereon is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

evidential only and not binding or conclusive as to the facts in the present case. This was a correct statement of the law.

However, all of the argument and instructions given or refused touching the alleged commission of a traffic offense by plaintiff have no bearing upon the sole question in this case, namely, did defendant use excessive and unnecessarily force in effecting his lawful plaintiff? If so he failed, the evidence not otherwise was guilty in this respect was so overwhelming as to rule all other issues, by comparison, immaterial.

The jury returned the only verdict that could properly be returned, and the judgment thereon is affirmed.

AFFIRMED.

McCombs, J.J., and O'Connor, J., concur.

40901

ANDREW BEDNARCZYK,
Appellee,

v.

ROSALIA KUDLA, et al.,
Defendants.

MATILDA YOELIN, Administratrix, etc.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

305 I.A. 490

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This proceeding involves the foreclosure of the lien of a trust deed dated March 24, 1922, executed by John and Rosalia Kudla, which has already occupied an unconscionable amount of time of the courts.

When plaintiff filed his complaint of foreclosure November 5, 1936, he made Matilda Yoelin, individually and as administratrix of the estate of Michael Gorski, a party defendant; a decree was entered ordering a sale of the property, from which Matilda Yoelin appealed directly to the Supreme court, claiming a prior judgment lien on the property by virtue of a decree in favor of Gorski, and attacking the validity of the trust deed and the foreclosure proceeding; the Supreme court, being of the opinion that no freehold was involved, transferred the case to this court. (370 Ill. 304.)

In an opinion filed by this court October 23, 1939, 301 Ill. App. (abst.) 610, we gave consideration to the various claims of Matilda Yoelin, with special reference to her claim that a creditor's bill was filed to subject Kudla's property to the lien of an award made to Michael Gorski under the Workmen's Compensation Act and that plaintiff's rights were subordinate to the Gorski decree. We held against these claims.

The master in chancery advertised and sold the premises in accordance with the terms of the decree for $5300, and the report of the sale and distribution was approved; Matilda Yoelin filed exceptions to this report, which were overruled, and again she appealed

No. 17,777. Argued January 12, 1965. Decided March 1, 1965.

This proceeding involves the ownership of the lien of a tax deed dated March 24, 1961, issued by John and Donald Smith, which has already occupied an unconscionable amount of time of the courts.

When plaintiff filed his complaint of foreclosure November 6, 1962, he made Matilda Smith, individually and as administratrix of the estate of Michael Smith, a party defendant; a decree was entered ordering a sale of the property, from which Matilda Smith appealed directly to the Supreme Court, claiming a prior judgment lien on the property by virtue of a decree in favor of Smith, and attacking the validity of the trust deed and the foreclosure proceeding; the Supreme Court, being of the opinion that no freehold was involved, transferred the case to this court. (170 Ill. App.)

In an opinion filed by this court October 22, 1964, 40 Ill. App. (Mbst.) 610, we gave consideration to the various claims of Matilda Smith, with special reference to her claim that a creditor's bill was filed to subject Smith's property to the lien of an award made to Michael Smith under the Workmen's Compensation Act and that plaintiff's rights were subordinate to the Smith decree. We held against these claims.

The matter in chancery advertised and sold the premises in accordance with the terms of the decree for 1962, and the report of the sale and distribution was approved; Matilda Smith filed exceptions to this report, which were overruled, and again she appealed

to the Supreme court, asserting that a freehold was involved. The Supreme court held otherwise and transferred the cause to this court. (371 Ill. 533.)

The only point now before this court is the regularity of the sale and the order approving it. The record shows that the master sold the property for $5300, which was the highest and best bid for cash; the attorney for Matilda Yaelin asserts that this sale was not for cash, but the record shows to the contrary. She also asserts that she bid, on behalf of Matilda Yaelin, $5350, which should have been accepted by the master. The record shows that she did not bid this amount in cash but offered in payment the decree entered upon her creditor's bill based on the award in Sorski, to which proceeding plaintiff was not a party, and which, as we have seen, was held by this court to be inferior to the rights of plaintiff and the rights of the trust deed foreclosed herein.

When the master's report came before the chancellor he told counsel for Matilda Yaelin that if she would bring into court a cashier's check for $20 more the court would accept it, but this proposition was not acted upon.

Her present appeal is wholly without merit. "It is just as important that there should be a place to end as that there should be a place to begin litigation." Stoll v. Gottlieb, 305 U. S. 165, 172.

The order of the chancellor approving the master's report of sale is affirmed.

ORDER AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

to the supreme court, averring that a fraudulent sale involved. The supreme court held otherwise and transferred the cause to this court. 177 Ill. 320.)

The only point now before this court is the regularity of the sale and the order approving it. The record shows that the master sold the property for $3000, which was the highest and best bid for cash; the attorney for Matilda Veslin asserts that this sale was not for cash, but the record moves to the contrary. The also asserts that the bid, on behalf of Matilda Veslin, $2000, which should have been accepted by the master. The record shows that she did not bid this amount in cash but offered in payment the debts owned upon her creditor's bill based on the award to Gerard, to which proceeding plaintiff was not a party, and which, as we have seen, was held by this court to be inferior to the rights of plaintiff and the rights of the trust deed foreclosed herein.

When the master's report came before the chancellor in this cause, counsel for Matilda Veslin that if she would bring into court a cashier's check for $50 more the court would accept it, but this proposition was not acted upon.

The present appeal is wholly without merit. "It is just as important that there should be a place to end as that there should be a place to begin litigation." Ennis v. Hopkins, 305 Ill. 5, 140, 142.

The order of the chancellor approving the master's report of sale is affirmed.

ORDER AFFIRMED.

McSurely, P.J., and O'Connor, J., concur.

40934

PEOPLE OF THE STATE OF ILLINOIS, ex rel., AUDITOR OF PUBLIC ACCOUNTS,
Appellee

v.

THE WEST SIDE TRUST AND SAVINGS BANK OF CHICAGO,
Appellee.

ABE MICHELSON,
Petitioner-Appellant.

APPEAL FROM
RECEIVER COURT,
COOK COUNTY.

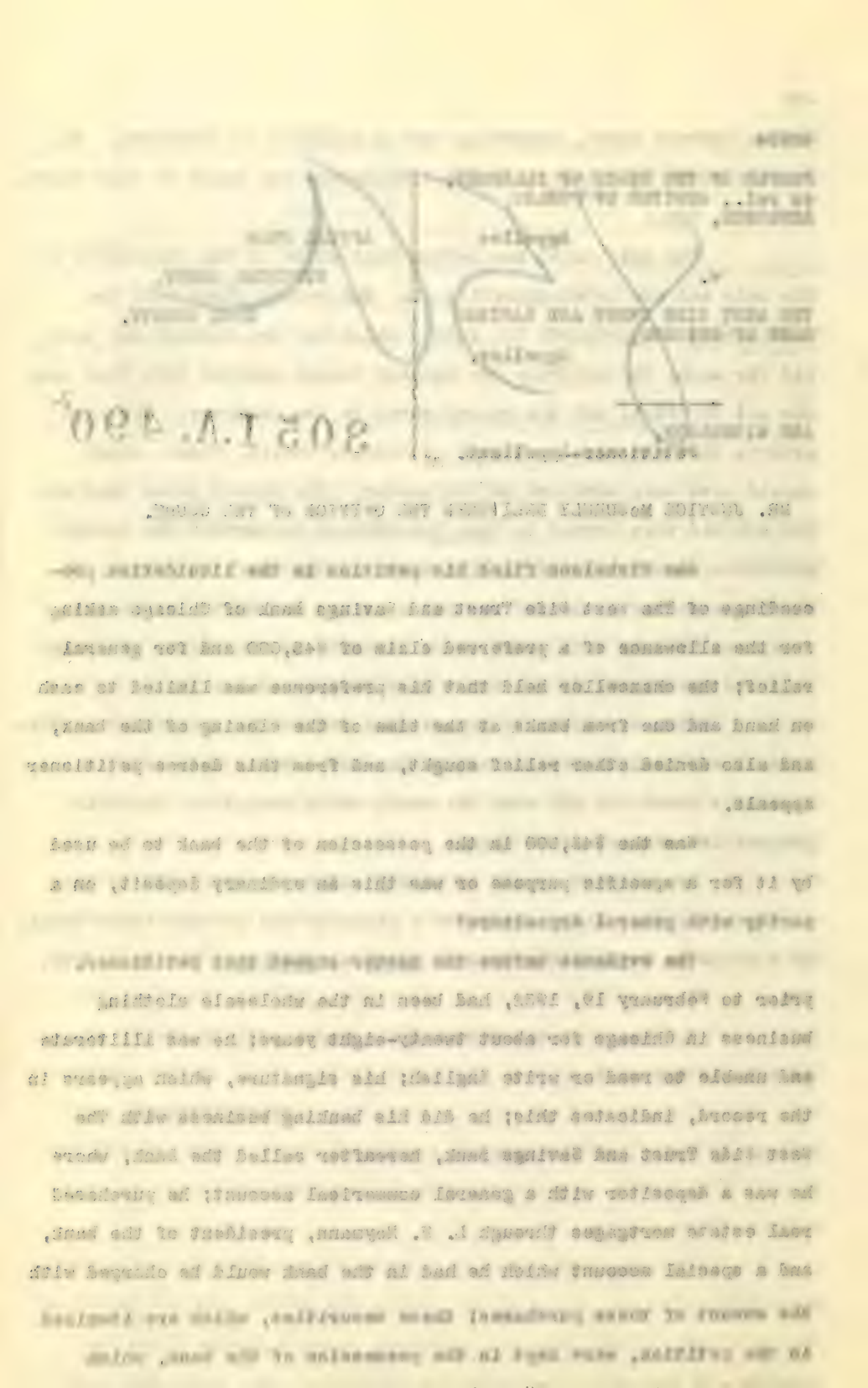
305 I.A. 490

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Abe Michelson filed his petition in the liquidation proceedings of The West Side Trust and Savings Bank of Chicago asking for the allowance of a preferred claim of $45,000 and for general relief; the chancellor held that his preference was limited to cash on hand and due from banks at the time of the closing of the bank, and also denied other relief sought, and from this decree petitioner appeals.

Was the $45,000 in the possession of the bank to be used by it for a specific purpose or was this an ordinary deposit, on a parity with general depositors?

The evidence before the master showed that petitioner, prior to February 13, 1932, had been in the wholesale clothing business in Chicago for about twenty-eight years; he was illiterate and unable to read or write English; his signature, which appears in the record, indicates this; he did his banking business with The West Side Trust and Savings Bank, hereafter called the Bank, where he was a depositor with a general commerical account; he purchased real estate mortgages through L. H. Heymann, president of the bank, and a special account which he had in the bank would be charged with the amount of these purchases; these securities, which are itemized in the petition, were kept in the possession of the bank, which issued to petitioner a "Safe-keeping receipt."



February 19, 1932, the bank was holding in safe keeping for petitioner securities of the face value of $62,000; in December, 1931, some of these securities had defaulted and petitioner discussed the matter with N. A. Weir, the bank's cashier; Heymann, the president, and Weir then had negotiations with petitioner as a result of which on February 19, 1932, the bank purchased all of petitioner's securities for $45,000, which was a loss to him of $17,000; the check for $45,000 was issued by the bank; Weir inquired of petitioner what he was going to do with the money; petitioner replied he was a sick man and wanted to protect his family and was going to buy liberty bonds with the $45,000; Heymann said liberty bonds were too high then but that he would purchase them for petitioner; on petitioner inquiring as to what Heymann would do with the money in the meantime, Heymann replied he had told Mr. Weir, the cashier, to put the money in a special account, "and it is just the same like you got your bonds and mortgages in safe-keeping," and "when the bonds go down" he would buy them for petitioner. The check was not in petitioner's possession but he endorsed it and turned it over to Weir, receiving a deposit slip from Weir; he said he was "kind of dizzy" and did not examine it. The president again repeated that the check was "like you got your paper in safe keeping and we buy liberty bonds for you." Thereafter plaintiff inquired at the bank once or twice a week as to whether they had purchased the liberty bonds for him.

Weir testified before the master that Heymann told him to refer the petitioner to him as he did not want petitioner to draw the money out of the bank; that petitioner was to be thrown "off the track from buying liberty bonds;" that all of the banks were in desperate straits on February 19, 1932, and thereafter, and the bank did not wish to deplete its assets by having petitioner withdraw his $45,000. Weir said he was instructed always to tell petitioner that the market on liberty bonds was still too high, and he, petitioner, "was always cast aside;" that in October, 1932, the money was still in the bank waiting to be used for the purchase of liberty bonds.

February 19, 1928, the bank was holding in safe keeping for petitioner securities of the face value of $40,000; in December, 1927, some of these securities had defaulted and petitioner discussed the matter with R. A. Weir, the bank's cashier; Heyman, the president, and Weir then had negotiations with petitioner at a result of which on February 19, 1928, the bank purchased all of petitioner's securities for $18,000, which was a loss to him of $17,000; the check for $43,000 was issued by the bank; Weir inquired of petitioner what he was going to do with the money; petitioner replied he had a sick man and wished to protect his family and was going to buy liberty bonds with the $43,000; Heyman said liberty bonds were the high than but that he would purchase them for petitioner; on petitioner inquiring as to what Heyman would do with the money in the meantime, Heyman replied he had said Mr. Weir, the cashier, to put the money in a special account, "and it is just the same like you get your bonds and mortgages in safe-keeping," and "when the bonds go down" he would buy them for petitioner. The check was not in petitioner's possession but he endorsed it and turned it over to Weir, receiving a deposit slip from Weir; he said he was "kind of dizzy" and did not examine it. The president again repeated that the check was "like you got your paper in safe keeping and we buy liberty bonds for you." Thereafter plaintiff inquired at the bank once or twice a week as to whether they had purchased the liberty bonds for him.

Weir testified before the master that Heyman told him to refer the petitioner to him as he did not want petitioner to know the money out of the bank; that petitioner was to be thrown "off the track from buying liberty bonds;" that all of the banks were in depreciate stocks on February 19, 1928, and thereafter, and the bank did not wish to deplete its assets by having petitioner withdraw his $43,000. Weir said he was instructed always to tell petitioner that the market on liberty bonds was still too high, and he, petitioner, "was always back again;" that in October, 1928, the money was still in the bank waiting to be used for the purchase of liberty bonds.

April 1, 1932, plaintiff was ill at his home, and at the request of Heymann, Ben Michelson, petitioner's brother, took a blank check to petitioner and had him sign it, saying that Heymann was going to buy $30,000 of liberty bonds. This check appears as a charge against the special account on April 1, 1932. The bank did not buy the liberty bonds but redeposited this check to the same account on the next day. Subsequently petitioner had frequent talks with Heymann concerning purchase of the liberty bonds, Heymann assuring petitioner that the market price was going down. Petitioner left for California on January 16, 1933; the Auditor of Public Accounts took charge of the bank on March 4, 1933 and a receiver was appointed. The bank never reopened. February 19, 1933, and at all times thereafter the bank had on hand in excess of $45,000 in cash.

All of the above facts are contained in the report of the master in chancery and supplemental report by the same officer serving as a special commissioner after the expiration of his term as master. The reports conclude that the $45,000 left with the bank for the specific purpose of buying liberty bonds became a trust fund for which petitioner was entitled to a preferred claim; that this was established by the three persons who were present at the time of the transactions. Heymann was not produced as a witness and did not testify. The reports find that the bookkeeping methods used by the bank in handling the funds are of no importance in view of the agreement to devote the fund to a specific purpose; that the device by Heymann of placing the fund in a special account was for the purpose of augmenting the bank's cash reserves; that this did not change the relationship of the parties. The supplemental report recommended a decree allowing to petitioner a $45,000 preferred claim, payable pro rata with other trust claims out of the deposit made by the bank with the Auditor of Public Accounts under the Trust Companies Act (chap. 32, par. 287 et sec., Ill. Rev. State. 1939), and if this be insufficient, that the receiver of the bank pay the balance with other preferred claims in priority over general claims.

April 1, 1956, plaintiff was ill at his home, and at the request of Bayman, Ben Nicholson, petitioner's brother, took a blank check to petitioner and had him sign it, saying that Bayman was going to buy $30,000 of Liberty bonds. This check appears as a charge against the special account on April 1, 1956. The bank did not buy the Liberty bonds but redeposited this check to the same account on the next day. Subsequently petitioner had frequent talks with Bayman concerning purchase of the Liberty bonds, Bayman assuring petitioner that the market price was going down. Petitioner left for California on January 16, 1956; the auditor of Public Accounts took charge of the bank on March 4, 1956 and a receiver was appointed. The bank never reopened. February 19, 1956, and at all times thereafter the bank had on hand in excess of $42,000 in cash.

All of the above facts are contained in the report of the matter in summary and supplemental report by the same officer accepting as a specific commissioner after the exploration of his term as master. The reports conclude that the $42,000 left with the bank for the specific purpose of buying Liberty bonds became a trust fund for which petitioner was entitled to a preferred claim; that this was established by the three persons who were present at the time of the transactions. Bayman was not produced as a witness and did not testify. The reports find that the bookkeeping methods used by the bank in handling the funds are of no importance in view of the agreement to devote the fund to a specific purpose; that the device by Bayman of placing the fund in a special account was for the purpose of augmenting the bank's cash reserves; that this did not change the relationship of the parties. The supplemental report recommended a decree allowing to petitioner a $42,000 preferred claim, jointly and with other that claim and of the report made by the bank with the auditor of Public Accounts under the State Banking Law (Comp. St. 1956, 67:4-4 et seq., 111. Ann. Stat. 1957), and if this be insufficient, then the receiver of the bank pay the balance with other preferred claims in priority and general claims.

Thereafter there intervened two trust and preferred claimants whose claims had been allowed by the court: namely, The Trust Company of Chicago, successor in trust under a certain trust agreement, and Edward Berkson, successor trustee under another trust agreement. In the decrees allowing their claims it was provided that these were to be paid prior to the claims of all other creditors, except those on a parity, and also gave them a lien on the deposit made with the Auditor of Public Accounts.

These claimants filed objections to the master's report, which were overruled; these objections urged that the relationship between petitioner and the bank was that of a creditor and debtor. Subsequently the receiver and these claimants filed further objections; the chancellor overruled these objections and exceptions except in certain particulars.

The decree found that there could be no question from the evidence that petitioner's $45,000 was left with the bank for the sole purpose of purchasing liberty bonds by the president for the benefit of petitioner; that an express parol trust was created, and petitioner was allowed a preferred claim, payable "pro rata with other preferred claims in the same manner." The decree then found that such preference was limited to cash on hand and cash due from banks at the closing of the bank, and also held that petitioner was not entitled to the benefit of the deposit with the Auditor of Public Accounts as petitioner's trust agreement was an oral agreement and not equivalent to a deed. We are of the opinion the master and chancellor were correct in holding that the evidence showed the creation of a trust fund of $45,000, left with the bank for a specifically designated purpose.

In People v. Farmers State Bank, 338 Ill. 134, 137, it was held that there are two kinds of bank deposits: special and general. As a rule when a general deposit is made the bank becomes the debtor of the depositor to the extent of the deposit, but where money is deposited to be used for a specifically designated purpose it is a

Therefore these intervened the trust and preferred claimants whose claims had been allowed by the court: namely, the Trust Company of Chicago, successor in trust under a certain trust agreement, and Chaud Dorman, assertedly therein under further trust agreement. In the decree allowing their claims it was provided that these were to be paid prior to the claims of all other creditors, except those on a parity, and also have that a lien on the deposits made with the Bankers or Public Accounts.

These claimants filed objections to the master's report, which were overruled; their objections argued that the relationship between petitioner and the bank was that of a creditor and debtor. Independently the receiver and these claimants filed further objections; the chancellor overruled these objections and exceptions except in certain particulars.

The decree found that there could be no question from the evidence that petitioner's $48,000 was left with the bank for the sole purpose of purchasing liberty bonds by the president for the benefit of petitioner; that an express trust was created, and petitioner was allowed a preferred claim, payable "pro rata with other preferred claims in the same manner." The decree then found that such preference was limited to cash on hand and cash due from banks at the closing of the bank, and also held that petitioner was not entitled to the benefit of the deposit with the bankers of Public Accounts as petitioner's trust agreement was an oral agreement and not equivalent to a deed. We are of the opinion the master and chancellor were correct in holding that the evidence showed the creation of a trust fund of $48,000, left with the bank for a specifically designated purpose.

In Peoria v. Pioneer State Bank, 206 Ill. 384, 387, it was held that there are two kinds of bank deposits: special and general. As a rule when a general deposit is made the bank becomes the debtor of the depositor to the extent of the deposit, but where money is deposited to be used for a specifically designated purpose it is a

special deposit and the relationship of debtor and creditor does not exist. This distinction has been followed in People v. Yates, 381 Ill. 439; Balar v. O'Connell, 365 Ill. 200, and other cases cited. Cases cited by opposing counsel, like People v. Farmers State Bank, supra., and People v. State Bank of Haywood, 354 Ill. 519, 526, are not in opposition, as in those cases the record disclosed no agreement whatever that the funds should be used for any particular purpose. It can hardly be claimed that the real estate securities originally purchased for petitioner's account and retained for safe keeping in the possession of the bank, established the relation of debtor and creditor. Bearing this in mind, no subsequent change in form of these securities or bookkeeping accounts with reference thereto changed its essential transaction as the creation of a trust.

No particular form of words is necessary to create a trust. Any expressions which show clearly the intention to create a trust will have that effect. Dawes v. Dawes, 116 Ill. App. 26; People v. Cairo-Alexander County Bank, 282 Ill. App. 543, 551; Wittmeier v. Heiligenstein, 308 Ill. 434, and other cases. Heymann was continuously deceiving petitioner for the purpose of "throwing him off the track" in the purchase of liberty bonds and Heymann's purpose was to keep the $45,000 fund as part of the assets of the bank. There is point in the suggestion by petitioner's counsel that the receiver should not take the position in support of Heymann's deceitful conduct by arguing against the return of petitioner's money to him.

It is unnecessary to comment upon the large number of cases cited by diligent counsel for all parties. Petitioner's claim rests upon the undisputed fact that the $45,000 left with the bank was to be held by it, just as it had held petitioner's securities, and to be used for the specific purpose of purchasing liberty bonds.

Reduced to its simplest elements we have the picture of an illiterate, ailing customer of a bank, trusting its officers to carry out his specific wishes concerning a certain fund intrusted to their care, and a bank president who, while pretending to the customer

special deposit and the relationship of debtor and creditor does not exist. This distinction was been followed in Jungle v. Bates, 381 III. 439; Baker v. O'Donnell, 288 III. 308, and other cases cited. Cases cited by appellee counsel, like Jungle v. Thomas State Bank, supra., and Jungle v. State Bank of Harvard, 344 III. 518, 528, are not in opposition, as in those cases the record disclosed no agreement whatever that the funds should be used for any particular purpose. It can hardly be claimed that the real estate securities originally pledged by petitioner's parents and retained for safekeeping in the possession of the bank, established the relation of debtor and creditor. Bearing this in mind, no subsequent change in form of those securities or bookkeeping accounts with reference thereto changed its essential transaction as the creation of a trust.

No particular form of words is necessary to create a trust. Any expressions which show clearly the intention to create a trust will have that effect. Jones v. Jones, 118 III. App. 381 Jungle v. Lake-Hinsdale County Bank, 288 III. App. 542, 551; Kitchens v. Kitchens, 298 III. 454, and other cases. Between the quantum-only desired petitioner for the payment of "Everything his off the-track" in the purchase of Liberty bonds and Kayssen's purpose was to keep the 140,000 fund as part of the assets of the bank. There is point in the suggestion by petitioner's counsel that the receiver should not take the position in support of Kayssen's deceitful conduct by arguing against the return of petitioner's money to him.

It is unnecessary to comment upon the large number of cases cited by diligent counsel for all parties. Petitioner's claim rests upon the undisputed fact that the 140,000 left with the bank was to be held by it, just as it had held petitioner's securities, and to be used for the specific purpose of purchasing liberty bonds.

Based on the simplest elements we have the picture of an illiterate, ailing partner of a bank, trusting its citizens to carry out his specific wishes concerning a certain fund intrusted to their care, and a bank president who, while pretending to the customer

to do as directed, attempted, by banking mechanics, to divert the customer's special fund into the general assets of the bank without the customer's knowledge and contrary to his directions. Nothing the bank might do could destroy the relationship of trustee and beneficiary without the consent of the beneficiary.

We are of the opinion the chancellor erred in not directing payment of petitioner's preferred claim in priority to general claims. As petitioner's $45,000 was intentionally used by the bank president to augment the assets of the bank when it was in financial difficulties, and did not use this fund for the specific purpose for which it was delivered to the bank, plaintiff is entitled to resort to the general mass of assets for the return of his money because that general mass was improperly augmented by the use the president made of petitioner's property. People v. Bates, 361 Ill. 439; People v. Chicago Bank of Commerce, 275 Ill. App. 68; People v. Ridgely-Farmers State Bank, 281 Ill. App. 292; Baiar v. O'Donnell, 284 Ill. App. 331; and People v. Illinois Bank & Trust Co., 290 Ill. App. 521. State, ex rel. Sorensen v. Farmers State Bank, 121 Neb. 532, contains a comprehensive discussion of the rule, and says: "General depositors are not entitled to the fruits of the bank's betrayal of trust. ** The doctrine requiring the beneficiary of a trust to trace his trust funds into some specific asset or property in the estate of the trustee or in the hands of his receiver as a condition of reclaiming them did not originate in any moral philosophy or in any sound principle of equity jurisprudence. The defense of that doctrine lacks cogent reasons and involves a resort to opinions reiterating initial fallacies. ** In equity the depositors do not have a valid claim for the amount of these trust funds. Equitably they belong to intervener and the district court wisely ordered the receiver to pay them in full." Many other decisions from other states might be cited to the same effect.

The special commissioner held that plaintiff, being the beneficiary under a valid express trust of personal property, is

to do as directed, attempted, by banking mechanics, to divert the commissioner's special fund into the general assets of the bank without the commissioner's knowledge and contrary to his directions. Nothing the bank might do could destroy the relationship of trustee and beneficiary without the consent of the beneficiary.

We are of the opinion the chancellor erred in not directing payment of petitioner's preferred claim in priority to general claims. As petitioner's $18,000 was intentionally used by the bank president to augment the assets of the bank when it was in financial difficulties, and did not use this fund for the specific purpose for which it was delivered to the bank, plaintiff is entitled to assert to the general mass of assets for the return of his money because that general mass was improperly augmented by the use the president made of petitioner's property. People v. Bates, 321 Ill. 439; People v. Illinois Bank of Commerce, 272 Ill. 49; 281 People v. Illinois-Germany State Bank, 301 Ill. 49, 133; Baker v. Gilmanell, 294 Ill. 49, 129; and People v. Illinois Bank & Trust Co., 290 Ill. 49, 121. Ziegler, et al. Peterson v. Farmers State Bank, 131 Ky. 322, overlooks a complementary discussion of the rule, and says: "General depositors are not entitled to the fruits of the bank's betrayal of trust." The doctrine requiring the beneficiary of a trust to trace his trust funds into some specific asset or property in the estate of the trustee or in the hands of his receiver as a condition of reclaiming them did not originate in any moral philosophy or in any sound principle of equity jurisprudence. The history of that doctrine lacks cogent reasons and involved a recent departure from opinions reflecting initial reliance. In equity the depositors do not have a valid claim for the amount of these trust funds. Possibly they belong to interveners but the district court wisely ordered the receiver to pay them in full." Many other decisions from other states might be cited to the same effect.

The special commissioner held that plaintiff, being the

entitled to the protection of the deposit made by the trustee with the Auditor of Public Accounts under the Trust Companies Act. The chancellor sustained exceptions to this finding and held that petitioner was not entitled to this protection, resting his decision upon the fact that the express trust herein was established by parol evidence and not by an instrument in writing. If the express trust is established by parol it is difficult to see why it should not have equal potency with an express trust established by a writing. The only difference relates to the evidence of the fact of the trust. It would seem sufficient to establish this by parol unless there is something in the statute which disqualifies such an express trust so established.

The Trust Companies Act (chap. 32, par. 287 et seq., Ill. Rev. Stats. 1939), was first passed in 1887; at the same session a new banking law was passed.(§1, Chap. 16-1/2, Smith-Hurd Stats. 1939.) This provided that banking corporations were authorized to "accept and execute trusts." The act placed no limitation upon the kinds of trusts which banks could accept and execute, but the use of the word "accept" indicates a voluntary assumption of an obligation and not those resultant and constructive trusts arising by operation of law. At that time the statutes seemed to bar corporations from acting as trustees, or as executors, conservators, grantees in deeds and trustees in real estate under wills. See 14A Corpus Juris 298, for a statement of the law at that time, the author saying that where there is no statutory repeal the old rule is still followed, and statutes providing for the appointment of persons to such positions of trust are construed to apply to real and not to artificial persons. It therefore became necessary, in order that corporations might be appointed as executors, trustees of real estate, etc., that a statute be passed permitting this and giving such corporations equal authority as in the case of the appointment of a natural person. Out of this situation grew the Trust Companies Act of 1887. As its title indicates, it is an act (1) to provide

entitled to the protection of the decrees made by the trustee with the auditor of public accounts under the Trust Companies Act. The chancellor sustained exceptions to this finding and held that petitioner was not entitled to this protection, vacating his decision upon the fact that the express trust herein was established by parol evidence and not by an instrument in writing. If the express trust is established by parol it is difficult to see why it should not have equal potency with an express trust established by a writing. The only difference relates to the evidence of the fact of the trust. It would seem sufficient to establish this by parol unless there is something in the statute which disqualifies such an express trust as established.

The Trust Companies Act (Ann. St. par. 227 et seq., Ill. Rev. Stats. 1909), was first passed in 1897; at the same session a new banking law was passed.[11] Then. 14-2\2, Smith-Hurd Stats. 1910.] This provided that banking corporations were prohibited to "accept and execute trusts." The act placed no limitation upon the kinds of trusts which banks could accept and execute, but the use of the word "accept" indicates a voluntary assumption of an obligation and not there resulting and constructive trusts arising by operation of law. At that time the statutes passed to bar corporations from acting as trustees, or as executors, conservators, grantees in deeds and trustees in real estate under wills. See Ill. Comp. Stats. 208, for a statement of the law at that time, the author saying that where there is no statutory repeal the old rule is still followed, and statutes providing for the appointment of persons to such positions of trust are construed to apply to real and not to artificial persons. It therefore became necessary, in order that corporations might be qualified as executors, trustees of real estate, etc., that a statute be passed permitting this and giving such corporations equal authority as in the case of the appointment of a natural person. Out of this situation grew the Trust Companies Act of 1897. As the title indicates, it is an act [1] to provide

for the administration of trusts by trust companies, and (2) to regulate the administration of trusts by trust companies. The banking act passed at the same time had for its purpose the removal of the restrictions on the appointment of corporations as trustees. By section 1 of the Trust Companies Act it is provided that any corporation incorporated under the general corporation laws "may be appointed assignee or trustee by deed, and executor, or trustee by will, and such appointment shall be of like force as in case of appointment of a natural person."

It should be noted that this is the only place in the Trust Companies Act which uses the words "trustee by deed, and executor, or trustee by will." It is based upon the presence of these words in the act that the conclusion is drawn that only such express trusts as are created by an instrument in writing can invoke the protection of the Trust Companies Act. We are of the opinion this is a misinterpretation.

Section 6 of the act provides for a deposit with the Auditor of Public Accounts for the benefit of creditors. This has been amended several times, and in 1925 it was amended so as to limit the corporation from accepting and executing "any trust concerning property" without complying with the provisions of this act. This language would seem to indicate a legislative intention not to limit the regulatory sections of the act to the express trusts referred to as created by deed or by will. A reasonable construction of the Trust Companies Act is that it applies its regulative provisions to all trusts which corporations are authorized to accept and execute. Such a construction would seem to be based upon common sense and fair dealing. In <u>In re National Bank of Ottawa</u>, 273 Ill. App. 545, it was held that a trust company's deposit with the Auditor of Public Accounts was for the protection of a beneficiary under a writing not under seal. In <u>Jones</u> v. <u>Lloyd</u>, 117 Ill. 597, a trust in real estate was upheld although the only evidence of the creation of the trust was a pleading in a prior suit. Such pleading

for the administration of trusts by trust companies, and (4) to regulate the administration of trusts by trust companies. The banking act passed at the same time had for its purpose the removal of the restrictions on the appointment of corporations as trustees. By section 1 of the Trust Companies Act it is provided that any appropriate incorporated under the general incorporation Acts "may be appointed managers or trustees by deed, and executor, or trustee by will, and such appointment shall be of like force as in case of appointment of a natural person."

It seems to [illegible] that this is the only place in the Trust Companies Act which uses the words "trustee by deed, and executor, or trustee by will." It is based upon the presence of these words in the act that the conclusion is drawn that only such express trusts as are created by an instrument in writing can invoke the protection of the Trust Companies Act. We are of the opinion this is a misinterpretation.

Section 6 of the Act provides for a deposit with the Auditor of Public Accounts for the benefit of creditors. This has been amended several times, and in 1899 it was amended so as to limit the corporation from acquiring and executing "any trust concerning property" without complying with the provisions of this act. This language would seem to indicate a legislative intention not to limit the regulatory sections of the act to the express trusts referred to as created by deed or by will. A reasonable construction of the Trust Companies Act is that it applies the legislative provisions to all trusts which corporations are authorized to accept and execute. Such a construction would seem to be based upon common sense and fair dealing. In re Kilbourn Book of Options, 177 III. App. 324, it was held that a trust company's deposit with the Auditor of Public Accounts was for the protection of a beneficiary under a working but naked trust. In Jones v. Ikard, 117 III. 267, a trust in real estate was upheld although the only evidence of the

was obviously not a deed. In Smith v. County of Logan, 384 Ill. 163, it was held that in construing a statute the intention is the controlling factor, and in Hoyne v. Danisch, 264 Ill. 467, it is said that in construing a statute such construction should be avoided which results in great inconvenience or absurd consequences unless the meaning of the legislature be so plain and manifest that avoidance is impossible. As pointed out in the brief for petitioner, if only express trusts created by deed or by will come under the protection of the Trust Companies Act, there would be withheld from its benefits written trusts involving real estate where no seal is affixed to the writing, trusts of personal property evidenced by writings not under seal, and trusts like that in the instant case, created by conversations, facts and circumstances.

Cases cited in opposition do not squarely meet the present point, although expressions may be found in some of the opinions indicating that the creation of the trust must be by some instrument in writing. In People v. Cody Trust Co., 294 Ill. App. 340, the point was whether there was an express trust or a trust created by operation of law, including resulting and constructive trusts. The court decided that the trust there under consideration was the latter kind and not, therefore, under the Trust Companies Act. A similar question was involved in People v. Chicago Bank of Commerce, 296 Ill. App. 497, where it was held that the evidence, although in writing, was not sufficient to create a trust. That case went to the Supreme court (371 Ill. 326), where it was noted that the appointment of the bank as trustee was actually under seal and therefore, technically, a deed, but after an analysis of the writing the court affirmed the judgment of the Appellate court that it was not sufficient to create an express trust.

We are of the opinion the petitioner, being the beneficiary of an express trust, created in a legally valid manner and accepted by the bank, is a trust creditor entitled to recourse against the deposit with the Auditor of Public Accounts.

was obviously not a deed. In Smith v. Church of Jesus, 326 Ill. 164, it was held that in construing a statute the intention is the controlling factor, and in Horne v. Jackson, 264 Ill. 487, it is said that in construing a statute such construction should be avoided which results in great inconveniences or absurd consequences unless the meaning of the legislature be so plain and manifest that avoidance is impossible. As pointed out in the brief for petitioner, if only express trusts created by deed or by will come under the protection of the trust companies act, there would be eliminate from its benefits written trusts involving real estate where no seal is affixed to the writing, trusts of personal property evidenced by writings not under seal, and trusts like that in the instant case, created by conversations, talks and discussions.

Cases cited in opposition do not squarely meet the present point, although expressions may be found in some of the opinions indicating that the creation of the trust must be by some instrument in writing. In Trumbo v. Lair Inst Co., 274 Ill. 490, 491, the point was whether there was an express trust or a trust created by operation of law, including resulting and constructive trusts. The court decided that the trust there under consideration was the latter kind and not, therefore, under the trust companies act. A similar question was involved in Davis v. Chicago Bank of Commerce, 308 Ill. 492, where it was held that the evidence, although in writing, was not sufficient to create a trust. That case went to the supreme court (271 Ill. 324), where it was noted that the signature of the bank as trustee was actually under seal and therefore, technically, a deed, but after an analysis of the writing the court affirmed the judgment of the appellate court that it was not sufficient to create an express trust.

We are of the opinion the petitioner, being the beneficiary of an express trust, evidenced in a legally valid manner and accepted by the bank, is a trust creditor entitled to recover against the deposit with the Auditor of Public Accounts.

For the foregoing reasons we hold that the chancellor should not have sustained the exceptions to the master's and special commissioner's report, and that in so doing reversible error was committed. The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with the recommendations of the master and his supplemental report.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P.J., concurs.

O'Connor, J., dissenting:

In my opinion the Trust Company Act is in no way applicable to the facts in the instant case. What defendant bank did was not done by virtue of that act.

For the foregoing reasons we hold that the chancellor should not have sustained the exceptions to the master's and special commissioner's report, nor that he in doing so acted properly over the committee. The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with the recommendations of the master and his supplemental report.

REVERSED AND REMANDED WITH DIRECTIONS.

Caldwell, P.J., concurs.

O'Connor, J., dissenting:

In my opinion the Trust Company act is in no way applicable to the facts in the instant case. Most defendant bank did was not done by virtue of that act.

40983

CLINT JORDAN, a minor, by ROBERT JORDAN, his father and next friend,
Appellee,

v.

RAILWAY EXPRESS AGENCY, Incorporated, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

305 I.A. 491

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, brought suit by his father, claiming that he sustained injuries by reason of the negligent operation of defendant's trailer truck which caused a collision between it and the Ford automobile which plaintiff was driving; upon trial by the court plaintiff was awarded damages of $85 from which defendant appeals.

The accident happened about 4 o'clock on the morning of January 21, 1939; the Ford car driven by plaintiff was proceeding north on Canal street; the truck was going south on Canal; at a point about 100 feet north of the intersection of Roosevelt road (which runs east and west) with Canal street, the truck turned east into a driveway which runs into the Chicago, Burlington & Quincy Railroad terminal; as the truck turned into this driveway it was struck by plaintiff's Ford car; the point of impact was between 7 and 8 feet west of the east curb of Canal street, with the truck headed into the driveway and about 10 feet beyond the east curb. Plaintiff has not appeared in this court in support of this judgment.

Plaintiff testified he was traveling about 15 to 20 miles an hour and noticed defendant's truck when it was about 50 feet from the driveway; that the truck was traveling between 25 and 30 miles an hour and plaintiff was 25 feet south of the driveway when he first saw the truck. Defendant argues that if plaintiff was driving a distance of 25 feet at 18 miles an hour and defendant's truck was going 25 to 30 miles an hour from a point 50 feet north of the driveway, it would have been impossible for defendant's truck to arrive

Plaintiff, a minor, brought suit by his father, claiming that he sustained injuries by reason of the negligent operation of defendant's trailer truck which caused a collision between it and the ford automobile which plaintiff was driving; upon trial by the court plaintiff was awarded damages of $85 from which defendant appeals.

The accident happened about 6 o'clock on the morning of January 21, 1935; the ford car driven by plaintiff was proceeding north on Canal street; the truck was going south on Canal; at a point about 150 feet north of the intersection of Roosevelt road (which runs east and west) with Canal street, the truck turned east into a driveway which runs into the Chicago, Burlington & Quincy Railroad terminal; as the truck turned into this driveway it was struck by plaintiff's ford car; the point of impact was between 7 and 8 feet west of the east curb of Canal street, with the truck headed into the driveway and about 10 feet beyond the east curb. Plaintiff has not appeared in this court in support of this judgment.

Plaintiff testified he was travelling about 12 to 30 miles an hour and noticed defendant's truck when it was about 60 feet from the driveway; that the truck was travelling between 25 and 30 miles an hour and plaintiff was 25 feet south of the driveway when he first saw the truck. Defendant argues that if plaintiff was driving a distance of 25 feet at 12 miles an hour and defendant's truck was going 25 to 30 miles an hour from a point 60 feet north of the drive-

at the point of collision prior to the time plaintiff arrived there. Plaintiff says he did not see the truck until it was 45 feet in front of him. The courts have said the law will not tolerate the absurdity of permitting one to testify that he looked and did not see, when, if he had properly exercised his sight, he would have seen. Grubb v. Illinois Terminal Co., 266 Ill. 530, 537.

Edward Mueller, the driver of defendant's truck, testified it was a 3-1/2 ton truck, loaded and headed for the Chicago, Burlington & Quincy terminal; that the entrance to this is on the east side of Canal street, 150 feet north of Roosevelt road, and is about 40 feet wide; that he first observed the Ford driven by plaintiff when it was 150 feet south of Roosevelt; at about one-fourth of a block before making the turn into the driveway he put on the directional arrow signal, indicating he was turning to the left; that when he started to turn, the Ford was about 100 feet south of Roosevelt road; the truck at this time was going about 6 miles an hour; the front part of the tractor was over the east sidewalk when the Ford struck it at a place about 16 to 19 feet from the front end. The witness said he turned on the signal lights about 60 feet before making the turn; that these signal lights are on the front fenders.

Fred Palm testified that he was employed in the police department of the Baltimore & Ohio Railroad; that upon the occasion in question he was walking south on the east side of Canal street; that he first saw the Ford when it was about 150 feet south of Roosevelt; that it was going between 50 and 55 miles an hour.

We are of the opinion that the finding of the court that defendant's driver of the truck was guilty of negligence and that plaintiff was free from contributory negligence was against the manifest weight of the evidence.

A fact of considerable importance in testing the reliability of plaintiff is that he testified he was a student at Crane High School; that the accident happened on Saturday morning; that

at the point of collision prior to the time plaintiff arrived there. Plaintiff says he did not see the truck until it was 40 feet in front of him. The courts have said the law will not tolerate the absurdity of permitting one to testify that he looked and did not see, when, if he had properly exercised his sight, he would have seen. Gunn v. Illinois Central R. R. Co., 168 Ill. App. 327.

Edward Mueller, the driver of defendant's truck, testified it was a 3-1/2 ton truck, loaded and headed for the Chicago, Burlington & Quincy terminal; that the entrance to this is on the east side of Canal street, 180 feet north of Roosevelt road, and is about 40 feet wide; that he first observed the Ford driven by plaintiff when it was 180 feet south of Roosevelt; at about one-fourth of a block before making the turn into the driveway he put on the directional arrow signal, indicating he was turning to the left; that when he started to turn, the Ford was about 100 feet south of Roosevelt road; the truck at this time was going about 3 miles an hour; the front part of the tractor was over the east sidewalk when the Ford struck it at a place about 18 to 12 feet from the front end. The witness said he turned on the signal lights about 80 feet before making the turn; that these signal lights are on the front fenders.

Fred Fain testified that he was employed in the police department of the Baltimore & Ohio Railroad; that upon the occasion in question he was walking south on the east side of Canal street; that he first saw the Ford when it was about 180 feet south of Roosevelt; that it was going between 30 and 35 miles an hour.

We are of the opinion that the finding of the court that defendant's driver of the truck was guilty of negligence and that plaintiff was free from contributory negligence was against the manifest weight of the evidence.

A fact of considerable importance in testing the reliability of plaintiff is that he testified he was a student at Crane High School; that the accident happened on Saturday morning; that the accident occurred on Saturday morning; that

he was nineteen years old and out of school for two weeks thereafter on account of the injuries received by him. On the motion for a new trial the principal and a teacher in the Crane High School testified that he was not absent from school for two weeks after the accident; that the school records show he was absent on January 26, but was present all other days of that week. The court indicated that he would reduce the judgment to $60, but when defendant indicated that an appeal would be taken the court said he would let the judgment stand at $85.

For the reasons indicated we hold that this judgment should not stand. It is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P.J., and O'Connor, J., concur.

he was nineteen years old and had of school for two weeks thereafter on account of the injuries received by him. In the matter for a new trial the principal and a teacher in the Tome High School testified that he was not absent from school for two weeks after the accident; that the school records show he was absent on January 14, 15 and seven all other days in that year. The court indicated that he would reduce the judgment to $50, but when informed indicated that an appeal would be taken the court said he would let the judgment stand at $50.

The the records indicate to this court this judgment should not stand. It is therefore reversed and the case remanded.

REFERENCE FOR REHEARING.

Rehearing, 5.4., and O'Connor, J., concur.

40865

WILBERT CLECK, [illegible],
ROBERT WILLIAMSON and DOROTHY
WILLIAMSON,
Appellees,

v.

HERBERT N. SMEBY, individually
and as executor, HERMIN SMEBY,
STANLEY SMEBY and RUTH SMEBY,
Appellants.

[illegible]
CIRCUIT COURT,
COOK COUNTY.

305 I.A. 491

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, the grandchildren of Georgiana Smeby, deceased, filed their complaint against Herbert N. Smeby, a son of the deceased, and his children to set aside the will of Georgiana Smeby and the probate thereof. They charged want of mental capacity of the testatrix and undue influence on the part of Herbert N. Smeby. Defendants denied the charges. There was a jury trial and a verdict returned that the instrument was not the last will and testament of Georgiana Smeby. A decree was entered setting aside the will and the probate thereof, and defendants appeal.

The record discloses that Georgiana Smeby was 80 years old and for a short time before October 6, 1937, had been confined to her bed. On that day she executed the will in question and died two days afterward. She lived in the first apartment of a two-story frame building at 3054 N. Pulaski road (formerly Crawford avenue), which she had owned for some time but which she conveyed to her son, Herbert Smeby (who lived upstairs), by a quitclaim deed, November 28, 1933. The deed was not recorded until July 27, 1937. At the time of the execution of the deed Mrs. Smeby, by a quitclaim deed, conveyed property located at 725 N. Racine avenue to her daughter, Hulda May Williamson and Herbert G. Williamson, her husband, in joint tenancy. This deed was recorded December 8, 1933.

The will provided for the payment of Mrs. Smeby's debts and

Plaintiffs, the grandchildren of Georgiana Tenby, deceased, filed their complaint against Robert C. Tenby, a son of the deceased, and his children to set aside the will of Georgiana Tenby and the probate thereof. They charged want of mental capacity of the testatrix and undue influence on the part of Herman C. Tenby. Defendants denied the charges. There was a jury trial and a verdict returned that the instrument was not the last will and testament of Georgiana Tenby. A decree was entered setting aside the will and the probate thereof, and defendants appeal.

The record discloses that Georgiana Tenby was 87 years old and for a short time before October 6, 1927, had been confined to her bed. On that day she executed the will in question and died two days afterward. She lived in the flat apartment of a two-story frame building at 4328 S. Talmadge and (formerly Crawford avenue), which she had owned for some time but which she conveyed to her son, Herbert Tenby (who lived upstairs), by a quitclaim deed, November 22, 1922. The deed was not recorded until July 27, 1927. At the time of the execution of the deed Mrs. Tenby, by a quitclaim deed, conveyed property located at 7833 S. Dante avenue to her daughter, Hulda May Williamson and husband C. Williamson, her husband, in joint tenancy. This deed was recorded December 6, 1923.

The will provided for the payment of Mrs. Tenby's debts and

bequeathed to Herbert E. Smeby, her son (one of defendants), her household goods, furniture, clothing, jewelry and personal effects; to Wilbur (Wilbert) Olson, her grandson (one of plaintiffs), $500, and to the three children of her deceased daughter, a note for $3,000 secured by a trust deed on Lake Zurich property. One-half of the residue of the estate was devised to her son Herbert, and the other half to be divided in equal parts - one-half to Herbert's children and half to the children of her deceased daughter, Hulda May Williamson. Herbert was named executor.

The evidence shows that the $3,000 note secured by the trust deed on Lake Zurich property, which had been executed by her daughter, Mrs. Williamson, and her husband, had been surrendered and a release deed executed at the time of the conveyance by Mrs. Smeby of her two pieces of property by quitclaim deeds, and that this was done because the property conveyed to Herbert was more valuable than that conveyed to Mrs. Williamson.

The evidence further shows that from about the year 1926 until October 6, 1937, Mrs. Smeby had executed four wills. July 16, 1937, her attorney Thomas Mathiesen, who had been acquainted with Mrs. Smeby for a number of years, drew a will for her with which she was not satisfied and afterward she desired to have this will changed which the attorney accordingly did, but, as testified to by him, he made an error by leaving out a paragraph; that about a week before October 6, he prepared another will and mailed it to Mrs. Smeby at her home; that after this will was mailed he received a telephone call informing him that Mrs. Smeby was ill; that he went to her home October 6, and found her in bed. At that time Laura Sckoff was in Mrs. Smeby's bedroom, arrangements having been made to have her there to witness the will; that Mrs. Smeby signed the will in the kitchen being unable to do so lying in bed and it was witnessed by the attorney and Laura Sckoff. Herbert, the son, was in the house at the time and there was some evidence he was in the kitchen when the will was executed.

bequeathed to Herbert s. Ikeby, her son (one of defendants), one Remington stock, rifle(sic), electric, heating and personal effects to Hilber (Hilbert) Olson, her grandson (one of plaintiffs), SOON, and to the three children of her deceased daughter, a note for $3,000 secured by a trust deed on lake Merkin property. One-half of the residue of the estate was devised to her son Herbert, and the other half to be divided in equal parts - one-half to Herbert's children and half to the children of her deceased daughter, Hulda Ty Williamson. Herbert was named executor.

The evidence shows that the $3,000 note secured by the trust deed on Lake Merkin property, which had been assumed by her daughter, Mrs. Williamson, and her husband, had been satisfied and a release had executed at the time of the conveyance by Mrs. Ikeby of her two places of property by quitclaim deeds, and that this was done because the property conveyed to Herbert was more valuable than that conveyed to Mrs. Williamson.

The evidence further shows that from about the year 1942 until October 6, 1947, Mrs. Ikeby had executed four wills. July 16, 1947, her attorney Thomas Mathiesen, who had been acquainted with Mrs. Ikeby for a number of years, drew a will for her with which she was not satisfied and afterward she decided to have this will changed which the attorney accordingly did, but, as testified to by him, he made an error by leaving out a paragraph; that about a week before October 6, he prepared another will and mailed it to Mrs. Ikeby at her home; that after this will was mailed he received a telephone call informing him that Mrs. Ikeby was ill; that he went to her home October 6, and found her in bed. At that time Laura Doherty was in Mrs. Ikeby's bedroom, arrangements having been made to have her there to witness the will; that Mrs. Ikeby signed the will in the kitchen being unable to do so lying in bed and it was witnessed by the attorney and Laura Doherty. Herbert, the son, was in the house at the time and there was some evidence he was in the kitchen when the will

Dr. George Schader, who first met Mrs. Smeby September, 1939, at his office, testified that he also treated her at his office February, 1936 and April 22, 1937, but did not see her from that date until October 8, shortly before she died. Mae Oliver, a registered nurse, testified she arrived on the case October 7, 1937, and stayed until the next day when Mrs. Smeby died. Jack Moe, a grocer, testified he saw her last on October 1, 1937. These five persons testified that in their opinion, when they saw Mrs. Smeby she was of sound mind and memory.

Seven witnesses on behalf of plaintiffs gave testimony to the effect that in their opinion Mrs. Smeby at the different times they saw her was not of sound mind and memory. They were Dr. Ulvestad, a dentist; his wife; Oscar Kolb, and insurance broker; Dr. Christenson; Herbert C. Williamson, Mrs. Smeby's son-in-law (but whose wife had died prior to the execution of the will); Robert F. Waddock and Lester Smell, Williamson's two sons-in-law. Dr. Brown (who was called by Herbert Smeby to attend his mother) saw her on the day the will was executed but he was not called as a witness. There is considerable other evidence in the record bearing on the subject as to the mental condition of Mrs. Smeby and as to whether undue influence had been exerted upon her by her son Herbert to bring about the execution of the will but we think it unnecessary to detail it here. Whether Mrs. Smeby had mental capacity to make the will and the question of undue influence were for the jury. Sulzberger v. Sulzberger, 372 Ill. 240. Upon a consideration of all the evidence in the record we are of opinion we would not be warranted in disturbing the verdict of the jury, confirmed as it was by the chancellor, on the ground it was against the manifest weight of the evidence.

Defendants contend they were denied a fair trial in the admission and exclusion of evidence. It is argued that Herbert C. Williamson was permitted to give testimony which was incompetent and highly prejudicial. He testified he was married to Mrs. Smeby's

Dr. George Lobnder, who first met Mrs. Mary Hightower, 1XXX, at his office, testified that he also treated her at his office February, 1XXX and April 1X, 1XX7, but did not see her from that date until October 8, shortly before she died. Mrs Oliver, a registered nurse, testified she arrived on the same October 7, 1XX7, and stayed until the next day when Mrs. Mary died. Jack Cox, a grocer, testified he saw her last on October 1, 1XX7. These five witness testified that in their opinion, when they saw Mrs. Mary she was of sound mind and memory.

Seven witnesses on behalf of plaintiffs gave testimony to the effect that in their opinion Mrs. Mary at the different times they saw her was not of sound mind and memory. They were Dr. Trowbel, a dentist; Ms wife; Oscar Bolb, and insurance broker; Dr. Christensen; Herbert E. Williamson, Mrs. Mary's son-in-law (but whose wife had died prior to the execution of the will); Robert T. Maddox and Lester Snell, Williamson's two sons-in-law. Mr. Brown (who was called by Herbert Mary to attend his mother) saw her on the day the will was executed but he was not called as a witness. There is considerable other evidence in the record bearing on the subject as to the mental condition of Mrs. Mary and as to whether undue influence had been exerted upon her by her son Herbert in bring about the execution of the will but we think it unnecessary to detail it here. Whether Mrs. Mary had mental capacity to make the will and the question of undue influence were for the jury. Hightower v. Hightower, 372 Ill. 240. Upon a consideration of all the evidence in the record we are of opinion we would not be warranted in disturbing the verdict of the jury, confirmed as it was by the chancellor on the ground it was against the manifest weight of the evidence.

Defendants contend they were denied a fair trial in the admission and exclusion of evidence. It is argued that Robert G. Williamson was permitted to give testimony which was incompetent and highly prejudicial. He testified he was married to Mrs. Mary's

daughter, who passed away August 13, 1937; that he had known Mrs. Smeby for about 30 years. He then testified concerning the two pieces of property conveyed by the quitclaim deeds executed by Mrs. Smeby. It was objected that this was immaterial. The court held the evidence might go to the question of undue influence. The witness then testified about the $5,000 note and other matters. That after the bank with which Mrs. Smeby did business closed, which was in 1932 or 1933, Mrs. Smeby seemed depressed and forgetful and often had severe pains; that they had Dr. Johnson examine her; that he observed her in August, 1937, the time Mrs. Williamson passed away, and she seemed to decline physically and mentally after that; that up to the time his wife died he saw Mrs. Smeby frequently but after that he did not see her often; that it was difficult for him to see her; that she would call for him but he was not told of this fact. The court: "What was the source of your information? If you did not get the messages, you didn't know anything about it. She had friends, didn't she? A. Laura Sekoff told us." It is objected this was hearsay and the objection was overruled. The witness further testified that Wilbert Olson, Mrs. Smeby's grandson and one of the plaintiffs, who lived with Mrs. Smeby, told him he had to go outside to telephone; that there was a telephone upstairs in Herbert's apartment but Herbert's family did not want him to use the telephone. In view of the record we are of opinion any error in this respect would not warrant us in holding that the verdict of the jury should be disturbed, Miss Sekoff having testified on the hearing.

We are also of opinion there was no error in permitting Mrs. Ulvested to testify that in her opinion Mrs. Smeby was unable to carry on her business transactions. Nor was there any error in permitting the witnesses to give testimony to the effect that Mrs. Smeby was very fond of her grandson, Wilbert Olson, as it might tend to show that there was undue influence which caused Mrs. Smeby to give but $300 to him. We are also of opinion there was no error in re-

daughter, who proved very valuable in, Lady; that he had known her, family for about 20 years. He knew testified concerning the his place of property occupied by the guilelain deeds executed by Mrs. Hardy. It was objected that this was immaterial. The court held the evidence might go to the question of undue influence. The witness was testified about the $1,000 note and other matters. That after the bank with which Mrs. Hardy did business closed, which was in 1928 or 1929, Mrs. Hardy seemed depressed and forgetful and often had severe pains; that they had Dr. Johnson examine her; that he observed her in August, 1927, the time Mrs. Hilliard passed away, and she seemed to decline physically and mentally after that; that up to the time his wife died he saw Mrs. Hardy frequently but after that he did not see her often; that it was difficult for him to see her; that she would call for him but he was not tell of this fact. The court: "What was the source of your information? If you did not get the message, you didn't know anything about it. She had friends, didn't she? A. Laura Hubert told me." It is objected this was immaterial and the objection was overruled. The witness further testified that Hilliard Olson, Mrs. Hardy's grandson and one of the plaintiffs, who lived with Mrs. Hardy, told him he had to go outside to telephone; that there was a telephone operator in Herbert's apartment but Herbert's family did not want him to use the telephone. In view of the record we are of opinion any error in this respect would not warrant us in holding that the verdict of the jury should be disturbed. Miss Hubert having testified on the hearing.

We are also of opinion there was no error in permitting Mrs. Elizabeth to testify that in her opinion Mrs. Hardy was unable to carry on her business transactions. Nor was there any error in permitting the witnesses to give testimony to the effect that Mrs. Hardy was very long of her grandson, Hilliard Olson, as it might tend to show that there was undue influence which caused Mrs. Hardy to give her $1000 to him. We are also of opinion there was no error in

fusing to permit Mrs. Merwin Smeby, wife of Merwin Smeby, one of the grandsons, and a defendant, to testify - she was incompetent. In re Estate of Teehan, 287 Ill. App. 58.

Complaint is also made that the court erred in restricting the cross-examination of Milbert Olsen. The complaint is that he testified on cross-examination he had lived with his grandmother for over 11 years. He was then asked if he ever paid her any board. It was objected this was not cross-examination and the objection was sustained. There was no error in the ruling. Nor was Olsen an incompetent witness, as defendants contend, because he was only interrogated on direct examination as to matters occurring after the grandmother's death. First par., sec. 2, chap. 51, Ill. Rev. Stats. 1939.

Complaint is also made that the court erred in permitting plaintiffs' counsel to impeach one of defendants' witnesses "in a manner not authorized by law;" that the court permitted Mildred J. Snell, one of plaintiffs, to relate a conversation with defendants' witness, Laura Kekoff, after the funeral of Mrs. Smeby. The witness testified that Laura Kekoff told the witness that Herbert Smeby, the uncle of witness, did not want parties interested to see the will for some reason; that he had discussed the will with his mother before it was executed; that she did not want to sign the will but afterward did so. The objection was that this was hearsay evidence and after the will was executed. In connection with this counsel for defendants say, "While Laura Kekoff was being cross-examined she was asked if such a conversation" had taken place. Miss Kekoff answered in the negative. We think there was no error in the ruling. The hearsay rule was in no way involved. Belt Ry. Co. v. Confrey, 209 Ill. 344.

Defendants further contend that the court erred in giving, at the request of plaintiffs, instructions numbers 1, 2, 3, 6, 7, 9 and 11, and in refusing to give defendants' tendered instruction 12. Instructions 1 and 2 advised the jury on the question of the mental capacity the law requires of one who makes a will, and No. 2 also included the element of "undue influence." There was no substantial

testing to parody the. Marvin Hoby, wife of Thomas Hoby, one of the executors, and a defendant, to testify - who was incompetent. In re Estate of Thomas, 287 Ill. App. 68.

Complaint is also made that the court erred in permitting the cross-examination of witness Clem. The complaint is that by testifying on cross-examination he had lived with his grandmother for over 11 years. He was then asked if he ever paid her any board. It was objected this was not cross-examination and the objection was sustained. There was no error in the ruling. Her was first in issue-being witness, as defendants argument, because he was only introducing an direct examination as to matters relating after the grandmother's death. First nat., nor. S. Ohap. Ill. Nor. Tuts. 1928.

Complaint is also made that the court erred in permitting plaintiffs' counsel to impeach one of defendants' witnesses "in a manner not authorized by law." That the court permitted witness Hoby, one of plaintiffs, to relate a conversation with defendants' witness, Laura Hobart, after the funeral of her. Hoby. The witness testified that Laura Hobart told the witness that Herbert Hoby, the uncle of witness, did not want anything interested to see the will for some reason; that he had discussed the will with his mother before it was executed; that she did not want to sign the will but afterwards did so. The objection was that this was improper evidence and after the will was executed. In connection with this counsel for defendants say, "this Laura Hobart was being cross-examined and was asked if she a conversation had taken place. Miss Hobart answered in the negative. He didn't there was no error in the ruling. The hearsay rule was in no way involved. Hoit Ex. In. v. Hoehner, 208 Ill. 344.

Defendants further contend that the court erred in giving at the request of plaintiff, instructions numbers 1, 2, 3, 4, 7, 8 and 11, and in refusing to give defendants' numbered instruction 12. Instructions 1 and 2 advised the jury as the constitution of the mental capacity the law requires of one who makes a will, and 3. I also in-

error in these instructions. Campbell v. Campbell, 160 Ill. 610; Davis v. Dutton, 177 Ill. 168; Salzberger v. Salzberger, 271 Ill. 248.

Counsel for defendants contend that the court gave a number of instructions on the question of "undue influence" although there was no evidence that would sustain such a charge. We think this contention cannot be sustained. There was evidence to the effect that shortly before Mrs. Smeby died, her son, Herbert, did not want plaintiffs to see her; that he called Dr. Brown to see his mother shortly before she died but did not call him as a witness, nor account for his absence; that the distribution of the property (which consisted of from $16,000 to $18,000) made by the will was some evidence properly to be considered on this question. There is other evidence in the record bearing on this question which we think unnecessary to detail here.

Instruction 6 complained of told the jury that "where a person receives the larger part of the property of a testatrix by her will," or where the will is made for the chief benefit of such person and such person is one in whom the maker reposes confidence and trust "and where such beneficiary causes the will to be prepared and is present at the time of the execution, such facts are circumstances tending to show the exercise of undue influence," and that if the jury believed from the evidence and under the instruction of the court that Mrs. Smeby reposed confidence in Herbert at the time of the execution of the will and that Herbert caused the purported will to be prepared and was present at the time the will was executed, the jury should consider such facts in determining the question of undue influence. One of the objections urged to this instruction is that there was no evidence that Herbert caused the will to be prepared; that it was prepared by the attorney, Thomas Mathiesen. Dr. Christenson testified that on October 3, he saw Mrs. Smeby and that she was on her deathbed; that Herbert asked him if his mother could take care of personal business and matters relating to finances. The

error in these instructions. Lambert v. Lambert, 139 Ill. 629; Hale v. Tatem, 207 Ill. 141; Dickerson v. Dickerson, 221 Ill. 64.

Counsel for defendants contend that the court gave a number of instructions on the question of "undue influence" although there was no evidence that would sustain such a charge. We think this contention cannot be sustained. There was evidence to the effect that shortly before she, Lady died, her son, Herbert, did not pick-a-little to see her; that he called in, drunk to see his mother shortly before she died but did not sign as a witness, nor account for his absence; that the distribution of the property (which consisted of from $10,000 to $12,000) made by the will was some evidence properly to be considered on this question. There is other evidence in the record bearing on this question which we think unnecessary to detail here.

Instruction 6 complained of tell the jury that "where a person receives the larger part of the property of a testatrix by her will," or where the will is made for the sole benefit of such person and such person is one in whom the maker reposes confidence and trust "and where such beneficiary causes the will to be prepared and is present at the time of the execution, such facts are circumstances tending to show the exercise of undue influence," and that if the jury believed from the evidence and under the instruction of the court that Mrs. Lady reposed confidence in Herbert at the time of the execution of the will and that Herbert caused the "proposed will to be prepared and was present at the time the will was executed, the jury should consider such facts in determining the question of undue influence. One of the objections urged to this instruction is that there was no evidence that Herbert caused the will to be prepared; that it was prepared by the attorney, Thomas Patterson. Mr. Patterson testified that on October 2, in our 1902, Lady and that she was on her deathbed; that Herbert asked him if his mother could take care of personal business and matters relating to finances. The

doctor replied in the negative. Thereafter, Dr. Christensen was not called but a new doctor was called in. Three days afterward the will was executed.

Wilbert Olson testified that after his grandmother died his uncle, Herbert, told him not to say anything to the Williamsons as to what took place. It was not error to give the instruction on the ground there was no evidence upon which to base any undue influence.

By instruction 7 the jury were told that "inequality in the distribution of property" among those who would inherit it if no will had been made is not of itself evidence of undue influence or unsoundness of mind but was a circumstance that might be considered as tending to establish undue influence or unsoundness of mind. We think the instruction was not substantially the same as the instruction condemned in Donnan v. Donnan, 236 Ill. 341. The instruction was taken verbatim from an instruction approved in England v. v. Fawbush, 204 Ill. 384. There was no error in giving the instruction.

Plaintiffs' instruction 3 told the jury what was charged in the complaint. There was no error in giving such an instruction since there was evidence tending to prove the allegations. Cent. Sy. Co. v. Bannister, 196 Ill. 48.

By instruction 9 the jury were told that in considering the case they should not set aside their own common observations and experience as men in the affairs of life, etc. but had the right to consider all the evidence in determining where the truth lies upon any material fact in the case. This was a proper instruction and the instruction, condemned in Steinberg v. Northern Illinois Telephone Co., 260 Ill. App. 538, is not in point. The instruction there authorized the jury to determine the law according to their common observation and experience. No such provision is in the instruction before us, but on the contrary the jury were told to take their experiences as men in connection with the evidence in determining the facts in the case.

doctor replied in the negative. Thereafter, Jr. Hairstonon was not called but a man doctor was called in. There they diagnosed the wife was neurotic.

Counsel then testified that after his preconviction that his uncle, Gaffney, had his not to put anything to the gentlemen as to what took place. He was not error in giving the instruction on the ground there was no evidence upon which to base any other instruction.

By instruction 7 the jury were told that "Insanity is the distribution of property among them who would inherit if it had been made in not of itself evidence of undue influence or unsoundness of mind but was a circumstance that might be considered in testing it existing under influence or unsoundness of mind. The instruction was not substantially the same as the instruction condemned in Tanner v. Tanner, 20 Ill. 341. The instruction was taken verbatim from an instruction approved in Dwight v. Pawsey, 20 Ill. 334. There was no error in giving the instruction.

Plaintiff's instruction 7 told the jury that was unsound in the complaint. There was no error in giving such an instruction since there was evidence tending to prove the allegations. Part. Ill. Co. v. Dunleavy, 158 Ill. 44.

By instruction 9 the jury were told that in considering the case they should not set aside their own common observations and experience as men in the affairs of life, and but and the right to consider all the evidence in determining where the truth lies upon any material fact in the case. This was a proper instruction and the instruction, condemned in Dwight v. Chicago Cigarette Tobacco Co., 201 Ill. 460, 466, is not in point. The instruction there authorized the jury to determine the law according to their common observation and experience. No such provision is in the instruction before us, but on the contrary the jury were told to take their experience as men in connection with the evidence in determining the

Complaint is also made to instruction 11, by which the jury were told who would inherit Mrs. Smeby's property in case there was no will. It is said this instruction ignored the will of Mrs. Smeby made July 16, 1937. There is no merit in this contention. The claimed will of July 16, was in no way before the jury for consideration. Moreover, the court at defendants' request told the jury that one could disinherit some of his heirs if he desired to do so.

It is also claimed the court erred in refusing to give an instruction tendered by defendants by which it was sought to have the jury told that "it is incumbent upon the Plaintiffs in this case to establish undue influence by a preponderance of the evidence." We think there was no error in refusing.

The jury were told in substance by a number of instructions that before they could find the testatrix was mentally incapable of making the will or that undue influence was used, they must believe these to be proven by a preponderance of the evidence. And in an instruction given at defendants' request, the jury were instructed that "The law presumes every person of legal age has sufficient mind and memory to make a valid will and casts upon those who contest a will the burden of establishing by the greater weight of the evidence that the person seeking to make the will was not, at the time, of sufficiently sound mind to make a valid will." Even if we assume that the word "establish" as used in the offered instruction was unobjectionable, we think the jury were sufficiently instructed on the two questions and the refusal to give the instruction was not reversibly erroneous.

Upon a consideration of the record we are of opinion that no error complained of was of such a character as would warrant us in disturbing the verdict or the decree.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

Complaint is also made to instruction 11, by which the jury were told she would inherit Mrs. Bagby's property in case there was no will. It is said this instruction ignored the will of Mrs. Bagby made July 16, 1927. There is no merit in this contention. The claimed will of July 16, was in no way before the jury for consideration. Moreover, the court at defendants' request told the jury that one could disinherit some of his heirs if he desired to do so.

It is also claimed the court erred in refusing to give an instruction tendered by defendants by which it was sought to have the jury told that "it is incumbent upon the plaintiffs in this case to establish undue influence by a preponderance of the evidence." We think there was no error in refusing.

The jury were told in substance by a number of instructions that before they could find the testatrix was mentally incapable of making the will or that undue influence was used, they must believe these to be proven by a preponderance of the evidence. And in an instruction given at defendants' request, the jury were instructed that "The law presumes every person of legal age has sufficient mind and memory to make a valid will and casts upon those who contest a will the burden of establishing by the greater weight of the evidence that the person undertook to make the will was not, at the time, of sufficiently sound mind to make a valid will." Even if we assume that the word "establish" as used in the offered instruction was unobjectionable, we think the jury were sufficiently instructed on the two questions and the refusal to give the instruction was not reversibly erroneous.

Upon a consideration of the record we are of opinion that no error complained of was of such a character as would warrant us in disturbing the verdict or the decree.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

40927

JUNE GOODENOUGH and LYDIA GOODENOUGH,

LYDIA GOODENOUGH,
Appellee,

v.

GEORGE OBERHARDT and HAROLD OBERHARDT, a minor, by GEORGE OBERHARDT, his father and next friend,

GEORGE OBERHARDT,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

305 I.A. 492

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Lydia Goodenough in a personal injury case, had a verdict and judgment in her favor for $2600 against George Oberhardt, which he seeks to reverse by this appeal.

The record discloses that about 3:30 o'clock in the afternoon of October 23, 1927, June Goodenough was driving her Ford automobile south in Laramie street. Her mother, Lydia Goodenough, was in the car with her and as she was crossing Foster avenue, an east and west through street, the car collided with an east-bound Chrysler automobile belonging to defendant, George Oberhardt, and driven by his son Harold. Foster avenue, which is located on the north side of Chicago, is a preferential street - there are four lanes for traffic. It is intersected at right angles by Laramie street, which has two lanes for traffic. A "Stop" sign is located at the northwest corner of the intersection.

Plaintiff's position is that the Ford car stopped at the "Stop" sign and saw defendant's automobile traveling 40 to 45 miles per hour east in the south lane in Foster avenue, about 300 feet west of Laramie street. The Ford then proceeded across the intersection and was struck by the eastbound car and both cars came to a stop at the southwest corner of the intersection.

On the other side, defendant's contention is that when

IN. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Lydia Goodenough is a personal injury case, and a verdict and judgment in her favor for $2000 against Henry Sherwood, which he seeks to reverse by this appeal.

The record discloses that about 2:30 o'clock in the afternoon of October 30, 1957, June Goodenough was driving her Ford automobile south in Lawndale street. Her mother, Lydia Goodenough, was in the car with her and as she was crossing Foster avenue, an east and west through street, the car collided with an east-bound Chrysler automobile belonging to defendant, Henry Sherwood, and driven by his son Harold. Foster avenue, which is located on the north side of Chicago, is a preferential street - there are four lanes for traffic. It is intersected at right angles by Lawndale street, which has two lanes for traffic. A "Stop" sign is located at the northwest corner of the intersection.

Plaintiff's position is that the Ford car stopped at the "Stop" sign and was defendant's automobile traveling 45 to 49 miles per hour east in the south lane in Foster avenue, about 300 feet west of Lawndale street. The Ford then proceeded across the intersection and was struck by the eastbound car and both cars came to a stop at the southwest corner of the intersection.

defendant's automobile was about 100 feet west of the intersection the Ford was about 90 feet north of the intersection, both traveling at about the same rate of speed; that Harold, the driver of defendant's car, continued on and when about 30 feet from Laramie street, the Ford car which was about 15 feet north of Foster seemed to be slowing down - did not stop, but on the contrary, increased its speed, and as a result the cars collided.

The daughter, who owned and was driving the Ford car, and her mother, brought suit against George and Harold Oberhardt. The complaint was in two counts. The first was for personal and property injuries sustained by the daughter, June, and the second for personal injuries sustained by the mother. Defendants filed answers and counter claims, Harold seeking to recover for personal injuries sustained by him, and George, the father, for damages to the Chrysler car. The jury found both defendants guilty and assessed damages at $2600 in favor of the mother, Lydia. Afterward on motion of plaintiff the judgment against Harold, the son, was set aside and the suit dismissed as to him. The jury also returned a verdict finding June was not guilty as to Harold's counter claim.

The only matter argued on this appeal is that the judgment against the father, George Oberhardt, is wrong and should be reversed on the grounds, (1) that Harold was not the father's agent at the time in question; (2) that the court erred in refusing to permit Allen Freeman, a lawyer who was assisting in the defense of the case, to testify; (3) that there was error in the instructions; (4) in the remarks of the court; (5) in the remarks and conduct of plaintiff's counsel, and (6) that the verdict is excessive.

(1) The evidence shows that Harold, who was about eighteen years old at the time of the accident, was driving his father's car "coming home from the safety lane. My father didn't send me, nobody did. I went there on my own business." He testified he took his father's car and drove it whenever he wanted to do so; that the father paid for the repairs, license, etc.; that

defendant's automobile was about 100 feet west of the intersection the Ford was about 60 feet north of the intersection, both traveling at about the same rate of speed; that Harold, the driver of defendant's car, continued on and when about 12 feet from Lamella street, the Ford car which was about 12 feet north of Foster ceased to be driving down - did not stop, but on the contrary, increased its speed, and as a result the cars collided.

The daughter, who owned and was driving the Ford car, and her mother, brought suit against George and Harold Shepard. The complaint was in two counts. The first was for personal and property injuries sustained by the daughter, June, and the second for personal injuries sustained by the mother. Defendants filed answer and counter claims, Harold seeking to recover for personal injuries sustained by him, and George, the father, for damage to the Chrysler car. The jury found both defendants guilty and assessed damages at $8000 in favor of the mother, Lydia. Afterward on motion of plaintiff the judgment against Harold, the son, was set aside and the suit dismissed as to him. The jury also returned a verdict finding June was not guilty as to Harold's counter claim.

The only matter argued on this appeal is that the judgment against the father, George Shepard, is wrong and should be reversed on the grounds, (1) that Harold was not the father's agent at the time in question; (2) that the court erred in refusing to permit Allan Freeman, a lawyer who was assisting in the defense of the case, to testify; (3) that there was error in the instructions; (4) in the remarks of the court; (5) in the remarks and conduct of plaintiff's counsel, and (6) that the verdict is excessive.

(1) The evidence shows that Harold, who was about eighteen years old at the time of the accident, was driving his father's car "seeing how the safety lasts." If father didn't send me, nobody did. I went there on my own business." He testified he took his father's car and drove it whenever he wanted to

on the day of the accident he took the car "to have it tested to comply with the rule of the police department, and to have a sticker put on it to show that it was examined." We think this evidence was sufficient to show that Harold, at the time, was the agent of his father.

(2) Plaintiff called John Bronold who testified he saw the accident and that the Ford car stopped at the north side of Foster avenue. On cross-examination he was asked by counsel for defendant if someone from counsel's office had not telephoned him yesterday and he answered, "Yes, sir." Q. "A young man by the name of Allen Freeman called you on the telephone --." This was objected to by counsel for plaintiff as being immaterial. The objection was overruled. The witness then said someone from defendant's counsel's office called him "Last night," and he did not say that he did not see the accident but that he told the person on the telephone just what he had testified to on the stand. The case then proceeded and afterward defendant called witnesses, one of whom was the young attorney Allen Freeman. Counsel for plaintiff objected to the witness testifying because he had been in the court room although the court had, on motion, ordered the witnesses to be excluded, and he was not permitted to answer. We think it clear the ruling was erroneous. When the rule excluding the witnesses was entered no one could have foreseen that Freeman would be called to testify and this did not develop until the witness Bronold was on the stand. The chief point in controversy on the trial was whether the Ford automobile stopped at the north side of the intersection. Witnesses for plaintiff testified that it was stopped at that point. On the other side, a number of witnesses testified that the Ford did not stop at the intersection. Bronold testified he saw the collision and that the Ford car was stopped before entering the intersection. It was sought to prove by Freeman that the night before the trial Bronold had told Freeman he did not see the accident. The ruling of the court was erroneous and under the circumstances, prejudicial.

on the day of the accident he took the car "to have it tested to comply with the rule of the police department, and to have a citizen put on it to show that it was examined." We think this evidence was sufficient to show that Farrell, at the time, was the agent of his father.

(2) Plaintiff called John Fromell who testified he saw the accident and that the Ford car stopped at the north side of Foster avenue. On cross-examination he was asked by counsel for defendant if someone from counsel's office had not telephoned his yesterday and he answered, "Yes, sir." Q. "A young man by the name of Allen Freeman called you on the telephone --." This was objected to by counsel for plaintiff as being immaterial. The objection was overruled. The witness then said someone from defendant's counsel's office called him "last night," and he did not say that he did not see the accident but that he told the person on the telephone just what he had testified to on the stand. The case then proceeded and defendant defendant called witnesses, one of whom was the young attorney Allen Freeman. Counsel for plaintiff objected to the witness testifying because he had been in the court room although the court had, on motion, ordered the witnesses to be excluded, and he was not permitted to answer. We think it clear the ruling was erroneous. Then the rule excluding the witnesses was entered so one could have thought that Freeman would be called to testify and this did not develop until the witness Fromell was on the stand. The other point in controversy on the trial was whether the Ford automobile stopped at the north side of the intersection. Witnesses for plaintiff testified that it was stopped at that point. On the other side, a number of witnesses testified that the Ford did not stop at the intersection. Fromell testified he saw the collision and that the Ford car was stopped before entering the intersection. It was enough to prove by Freeman that the night before the trial Fromell had told Freeman he did not see the accident. The ruling of the court was erroneous and under the circumstances, prejudicial.

Defendant complains of an instruction given at plaintiff's request as to the right-of-way of vehicles approaching an intersection. The complaint is that the statute which was embodied in the instruction does not apply where there are stop signs at an intersection. The jury had the right to be told, as they were by the instruction, that under certain circumstances mentioned in the instruction, vehicles approaching intersections from the right had the right-of-way over those approaching from the left, and this rule was not changed by the fact that there was a stop sign at the intersection.

The other objections urged by counsel for defendant as to the remarks of the court and of plaintiff's counsel, and that the verdict is excessive, we think need not be discussed here, since we have reached the conclusion that there must be a new trial on account of the error in refusing to permit the witness, Freeman, to testify.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P.J., and McSurely, J., concur.

Defendant complains of an instruction given at plaintiff's request as to the right-of-way of vehicles approaching an intersection. The complaint is that the statute which was embodied in the instruction does not apply where there are only signs at an intersection. The jury had the right to be told, as they were by the instruction, that under certain circumstances mentioned in the instruction, vehicles approaching intersections from the right had the right-of-way over those approaching from the left, and this rule was not changed by the fact that there was a stop sign at the intersection.

The other objections urged by counsel for defendant as to the remarks of the court and of plaintiff's counsel, and that the verdict is excessive, we think need not be discussed here, since we have reached the conclusion that there must be a new trial on account of the error in refusing to permit the witness, Freeman, to testify.

The judgment of the superior court of Cook county is reversed and the cause remanded.

McBRIDE and McSURELY, JJ., concur.

40937

AUGUST BLOCK,
Appellant,

v.

W. W. KIMBALL COMPANY, a corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

305 I.A. 492

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover $10,407.20 claimed to be due under the terms of an oral agreement. There was a jury trial and a verdict in plaintiff's favor for $3,000. Defendant moved for judgment notwithstanding the verdict and at the time also moved that in the event such motion was denied, that it be granted a new trial. Afterward plaintiff, by leave of court, filed his motion for a judgment in his favor for $10,407.20 instead of the $3,000 awarded to him by the verdict of the jury. The court sustained defendant's motion for a judgment notwithstanding the verdict and plaintiff appeals.

The record discloses that plaintiff in 1918 was employed by defendant in the making of pianos. He continued working for defendant until about February or March, 1930, when he left the company. When he was first employed he "was doing cabinet work on the bench making grand pianos," and continued at that work until 1923, at which time he was made foreman of the department. He continued in such position until about September 24, 1927, when he entered into an oral agreement with defendant whereby he was to be in charge of the department. He was to be paid certain specified prices for the work completed in that department, out of which he was to pay the wages of the men (around 30 in number) and what was left was to be paid to him for his compensation. There is no dispute about the oral agreement except that defendant's position is that he was to be paid, as above stated, but not to exceed $50 per week, while plaintiff's position is there was no such limitation.

Plaintiff brought an action against defendant to recover $10,407.80 claimed to be due under the terms of an oral agreement. There was a jury trial and a verdict in plaintiff's favor for $3,000. Defendant moved for judgment notwithstanding the verdict and at the time also moved that in the event such motion was denied, that it be granted a new trial. Alternatively plaintiff, by leave of court, filed his motion for a judgment in his favor for $10,407.80 instead of the $3,000 awarded to him by the verdict of the jury. The court sustained defendant's motion for a judgment notwithstanding the verdict and plaintiff appeals.

The record discloses that plaintiff in 1910 was employed by defendant in the making of glasses. He continued working for defendant until about February or March, 1921, when he left the company. Then he was first employed by "the Acme Optical Co. in the manufacturing grind plants," and continued at that work until 1923, at which time he was made foreman of the department. He continued in such position until about September 24, 1927, when he entered into an oral agreement with defendant whereby he was to be in charge of the department. He was to be paid certain specified prices for the work completed in that department, one of which he was to pay the wages of the men (around 20 in number) and what was left was to be paid to him for his compensation. There is no dispute about the oral agreement except that defendant's position is that he was to be paid, as above stated, but not to exceed 10% per week, while plaintiff's position is there was no such limitation.

The evidence shows that every two weeks plaintiff made out the payroll showing the amount earned by each man who worked in the department; the amount to be paid by defendant for each specified piece of work; from the total of these prices, the men's wages were deducted, and the balance remaining was paid to plaintiff. For example, the first payroll made by plaintiff under the oral agreement shows defendant company was to pay $2211.53. The amount the men had earned during the two weeks was $2116.05, leaving a balance of $95.48, which was paid to plaintiff. The men were also paid by defendant the amounts specified in the payroll. Plaintiff continued in this work from September, 1927 until December, 1928, when he was somewhat demoted and Herman H. Kunde, who had been an employee of the company for 34 years was made foreman of the cabinet department. Two departments at that time were consolidated and from that time the payrolls were approved by Kunde. This method was followed from December, 1928 until sometime in January, 1930, when plaintiff was advised that he would have to go back to work on the bench. Shortly thereafter, plaintiff claimed he had not been paid all that was coming to him under the terms of the oral contract and he testified he presented defendant with a bill for $10,407.20, the amount for which he sued. A few weeks thereafter, plaintiff left his employment and has not worked there since.

Three witnesses for defendant denied that plaintiff's claim was presented to them, as testified to by him. The substance of their testimony is that they did not see the bill until shortly before the trial, which was begun March 20, 1934. Plaintiff brought his suit on January 24, 1935.

The bi-weekly payrolls, all of which were made out by plaintiff beginning October 8, 1927 and the last dated January 25, 1930, show the amounts paid by defendant to plaintiff every two weeks covering that period and nearly every bi-weekly payment made to plaintiff was $99 and some cents, except the first payroll shows he was paid $95.48 and a few others were approximately $98. The evidence shows the number of hours worked every week by plaintiff.

The evidence shows that every two weeks plaintiff made out the payroll showing the amount earned by each man who worked in the department; the amount to be paid by defendant for each specified piece of work; from the total of these prices, the man's wages were deducted, and the balance remaining was paid to plaintiff. For example, the first payroll made by plaintiff under the oral agreement shows defendant company was to pay $2211.54. The amount the men had earned during the two weeks was $2113.09, leaving a balance of $98.45, which was paid to plaintiff. The men were also paid by defendant the amounts specified in the payroll. Plaintiff continued in this work from September, 1927 until December, 1928, when he was somewhat demoted and Herman A. Runde, who had been an employee of the company for 34 years was made foreman of the cabinet department. The departments at that time were consolidated and from that time the payrolls were signed by Runde. This method was followed from December, 1928 until sometime in January, 1930, when plaintiff was advised that he would have to go back to work on the bench. Shortly thereafter, plaintiff claimed he had not been paid all that was coming to him under the terms of the oral contract and he testified he presented defendant with a bill for $10,407.30, the amount for which he sued. A few weeks thereafter, plaintiff left Mr. Anderson and has not worked there since.

There evidence for defendant denied that plaintiff's claim was presented to them, as testified to by him. The substance of their testimony is that they did see the bill until shortly before the trial, which was begun March 20, 1933. Plaintiff brought his suit on January 24, 1932.

The bi-weekly payrolls, all of which were made out by plaintiff beginning October 8, 1927 and the last dated January 18, 1930, show the amounts paid by defendant to plaintiff every two weeks covering that period and nearly every bi-weekly payment made to plaintiff was $98 and some cents, except the first payroll shows he was paid $98.45 and a few others were approximately $98. The

They vary from 104 hours down to 94-1/2, 88, 79-1/2, and one but 31-1/2 hours but on each occasion he was paid substantially the same amount, a little more than $99. On one of the payrolls, July, 1929, he was given two checks for his two weeks' work of $52.99 each. A witness for defendant testified he called this to plaintiff's attention and that he should not again go over the $100 for two weeks' pay. This testimony is denied by plaintiff who explains he drew the two checks so that the other men who were being paid at the time would not know he was drawing over $100 because if they did they might be dissatisfied with the amount they were receiving.

Plaintiff's testimony is further to the effect that from September 24, 1927 until about January 28, 1930, he never made any demand or said anything to defendant that he was entitled to more money than he was being paid as shown on the bi-weekly payrolls and that the reason he did not was that he was saving the money so that in case there were slack times it could be drawn against by defendant to pay the men.

The evidence as to the making of the oral agreement in September, 1927, is that plaintiff, Kunde and Hussby were present, the latter two representing defendant company, and, as stated, there is no disagreement in their testimony except on the point that plaintiff says there was no limit of $50 per week placed on the amount he was to recover, while on the other side, Hussby, who was the production man and superior to plaintiff and Kunde, and who had been in the employ of the company for 42 years, testified that the maximum of $50 per week was placed upon the amount plaintiff was to receive and this is also the testimony of Kunde.

On the trial, on cross-examination, Kunde testified that shortly before Hlock left defendant company in February or March, 1930, he checked up what had been produced in the department in which plaintiff was employed and that "As near as I can remember, the surplus was about $5,000.00, the accumulative. That consisted of various parts of grand piano. There were some complete cases. As to how many I would have, *** to trust my memory, I could not answer

they very from 104 hours down to 64-1/2, 88, 79-1/2, and one but 81-1/2 hours but on each occasion he was paid substantially the same amount, a little more than $80. On one of the payrolls, July, 1949, he was given two checks for his two weeks' work of $42.92 each. A witness for defendant testified he called this to plaintiff's attention and that he should not again go over the 120 for two weeks' pay. This testimony is denied by plaintiff who explains he knew the two checks so that the other man who were being paid at the time would not know he was drawing over $120 because if they did they might be dissatisfied with the amount they were receiving.

Plaintiff's testimony is further to the effect that from September 24, 1947 until about January 28, 1950, he never made any demand or said anything to defendant that he was entitled to more money than he was being paid as shown on the bi-weekly payroll and that the reason he did not was that he was saving the money so that in case there were slack times it could be given against by defendant to pay the men.

The evidence as to the making of the oral agreement in September, 1947, is that plaintiff, Frank and Grandy were present, the latter two representing defendant company, and, as stated, there is no disagreement in their testimony except on the point that plaintiff says there was no limit of $80 per week placed on the amount he was to receive, while on the other side, Grandy, who was the production man and superior to plaintiff and Frank, and who had been in the employ of the company for 42 years, testified that the maximum of $80 per week was placed upon the amount plaintiff was to receive and this is also the testimony of Frank.

On the trial, on cross-examination, Frank testified that shortly before Black left defendant company in February or March, 1950, he checked up what had been produced in the department in which plaintiff was employed and that "as near as I can remember, the employee was about $2,000.00, the accumulative. That represented at Taylor parts of about eight years. There were some complete cases in

that correctly. I did not make a written memorandum of it at that time. That figure was in my memory."

The defense interposed was (1) that plaintiff had been paid in full, and (2) the Five Year Statute of Limitations barred plaintiff's claim. At defendant's request the court instructed the jury that defendant had pleaded the Statute of Limitations and therefore plaintiff could not recover for such amounts, if any, as they found became due to him "within five years before the commencement of this suit which was on January 24, 1935."

(1) Defendant contends that the record discloses plaintiff has been paid in full; that the bi-weekly payrolls made out by plaintiff, covering the 28 months he worked under the oral agreement of September 24, 1927, shows plaintiff was paid approximately $40 and some cents every two weeks and that this course of dealing between the parties show the construction of the oral agreement placed upon it by the parties, viz., that plaintiff was not to receive more than $50 per week. In further support of this contention counsel for defendant say that prior to the oral agreement plaintiff was working in the grand cabinet department for 90 cents an hour and at that time worked 52 hours a week, so that his weekly wages were $46.80; that under the oral agreement, as testified to by witnesses for defendant, plaintiff received approximately $13 a month more than he was paid prior to that time - about $202 per month, while under plaintiff's version of the oral agreement, plaintiff would be receiving $574 a month, or an increase of approximately $371 per month and that such result shows plaintiff's version of the matter to be wholly without merit. In this connection we might say that plaintiff, during the time he worked under the oral agreement, drew $6,066 as appears from the payrolls made out by him, and in addition to this sum he seeks to recover $10,407.20 more, or an additional $371 a month.

On the other hand, counsel for plaintiff say the increase in pay which plaintiff claims he was entitled to under the oral agreement, is entirely reasonable in view of the fact that the

that correctly. I did not make a written memorandum of it at that time. That figure was in my memory."

The defense interposed two (1) that plaintiff had been paid in full, and (2) the five year statute of limitations barred plaintiff's claim. At defendant's request the court instructed the jury that defendant had pleaded the statute of limitations and therefore plaintiff could not recover for such amounts, if any, as they found became due to him "within five years before the commencement of this suit which was on January 24, 1928."

(1) Defendant contends that the record disclosed plaintiff has been paid in full; that the bi-weekly payrolls made out by plaintiff, covering the 26 months he worked under the oral agreement of September 24, 1927, show plaintiff was paid approximately $25 and some cents per week; and that this course of dealing between the parties show the construction of the oral agreement placed upon it by the parties, viz., that plaintiff was not to receive more than $50 per week. In further support of this contention counsel for defendant say that prior to the oral agreement plaintiff was working in the grand cabinet department for 50 cents an hour and at that time worked 88 hours a week, so that his weekly wages were $40.00; that under the oral agreement, as testified to by witnesses for defendant, plaintiff received approximately $12 a month more than he was paid prior to that time - about $300 per month, while under plaintiff's version of the oral agreement, plaintiff would be receiving $574 a month, or an increase of approximately $271 per month and that such results show plaintiff's version of the matter to be really without merit. In this connection we also may note that plaintiff, during the time he worked under the oral agreement, drew $6,000 as appears from the payrolls made out by him, and in addition to this one he held to income tax, $4,000.00 more, or an average $271 a month.

On the other hand, insisted by plaintiff and the testimony in our view plaintiff states to the contrary to make the oral

thirty-odd men employed in the department where plaintiff worked must be paid first before he would receive anything.

Plaintiff testified he made no claim for additional compensation during the 28 months he worked under the oral agreement. This fact, taken in connection with all the evidence in the record, we think, clearly shows that the verdict of the jury, which apparently adopted plaintiff's version of the oral agreement, is against the manifest weight of the evidence. If this were the only error complained of, the judgment would have to be reversed and the cause remanded for a new trial but we are of opinion that practically all of plaintiff's claim was barred by the Five Year Statute of Limitations. And although the court instructed the jury, as above stated, that if they found for plaintiff they could only award such compensation or such amounts as they found became due to him "within five years before the commencement of this suit which was on January 24, 1935." The verdict is in the teeth of this instruction because five years before the commencement of the suit would be approximately January 25, 1930, and plaintiff earned nothing under the oral contract after January 25, 1930.

In Miller v. Cinnamon, 168 Ill. 447, it was held that in a suit brought on an oral contract to recover wages at $5 a week for services rendered from August 1, 1882 to March 30, 1892, the Five Year Statute of Limitations, which was interposed, barred recovery for all wages claimed to be due five years prior to the beginning of the suit. In that case plaintiff, a sister of defendant, worked for him on a farm and claimed $5 a week for her services. She sought to recover for a period of nearly ten years. The contract was oral. The court there said: "The appellee [plaintiff] was only entitled to recover for services rendered within five years prior to the date when the suit was brought, *** unless she could show some new promise on the part of appellant sufficient to take the case out of the Statute of Limitations." Defendant requested instructions on the Statute of Limitations which the court refused and this was held to be error.

thirty-six men employed in the department where plaintiff worked must be paid first before he would receive anything.

Plaintiff testified he made no claim for additional compensation during the 24 months he worked under the oral agreement. This fact, taken in connection with all the evidence in the record, we think, clearly shows that the verdict of the jury, which apparently adopted plaintiff's version of the oral agreement, is against the manifest weight of the evidence. If this were the only error complained of, the judgment would have to be reversed and the cause remanded for a new trial but we are of opinion that practically all of plaintiff's claim was barred by the five year statute of limitations. And although the court instructed the jury, as above stated, that if they found for plaintiff they could only make such compensation or such amounts as they found became due to him within five years before the commencement of this suit which was on January 24, 1920, " the verdict is in the teeth of this instruction because five years before the commencement of the suit would be approximately January 25, 1920, and plaintiff served nothing under the oral contract after January 25, 1920.

In Miller v. Simmons, 180 Ill. 447, it was held that in a suit brought on an oral contract to recover wages at $2 a week for services rendered from August 1, 1892 to March 30, 1899, the five year statute of limitations, which was interposed, barred recovery for all wages claimed to be due five years prior to the beginning of the suit. In that case plaintiff, a sister of defendant, worked for him on a farm and claimed $2 a week for her services. She sought to recover for a period of nearly ten years. The contract was oral. The court there said: "The appellee [plaintiff] was not entitled to recover for services rendered within five years prior to the date when the suit was brought, " unless she could show some promise on the part of appellant sufficient to take the case out of the Statute of Limitations." Defendant requested instructions on the Statute of Limitations which the court refused and this was held

In the instant case, plaintiff testified that the records which he kept and which are in evidence, show the amount of work completed in his department, and that upon such completion he was entitled to be paid. The evidence shows substantially all of the work was completed and delivered more than five years before the suit was brought. And as said by the Supreme court in the Miller case, "we do not think the evidence shows a case of mutual accounts."

Counsel for plaintiff contend the Statute of Limitations has no application to plaintiff's claim and O'Brien v. Sexton, 140 Ill. 617, is relied upon. In that case, O'Brien brought suit on a contract upon which payments had been made at different times. The question of the Statute of Limitations was the controlling point in the case. O'Brien entered into a contract with Sexton to provide all material and perform all work in plastering a certain building then being erected by Sexton, for which O'Brien was to be paid $9990 in installments as the work progressed. O'Brien did not complete the work claiming he had been prevented from doing so by Sexton. On the other hand, Sexton contended O'Brien had abandoned the work and he was required to finish the job at a cost greater than the contract price. The court said that the last work done by O'Brien was one day less than five years before he brought suit; that the work to be performed by O'Brien for Sexton "was an entirety;" that "where one continuous piece of work, consisting of a number of parts or items, is to be performed, the statute of limitations does not begin to run upon the completion of each separate part or item, but upon the completion of the whole." We think that case is not in point. There O'Brien was to be paid for completing the job $9990, while in the case before us, plaintiff was to be paid by the piece, as and when the work on the pieces was completed. This is shown by plaintiff's testimony and by the method in which the business was conducted. We think the Five Year Statute of Limitations barred plaintiff's claim and therefore the court did not err in entering judgment in favor of defendant notwithstanding the verdict.

In the instant case, plaintiff testified that the records which he kept and which are in evidence, show the amount of work completed in his department, and that upon such completion he was entitled to be paid. The evidence shows substantially all of the work was completed and delivered more than five years before the suit was brought. And as held by the Supreme Court in the Gilliam case, "we do not think the evidence shows a case of mutual accounts."

Counsel for plaintiff contend the statute of limitations has no application to plaintiff's claim and O'Brien v. Barlow, 147 Ill. 614, is relied upon. In that case, O'Brien brought suit on a contract upon which payments had been made at different times. The question of the statute of limitations was the controlling point in the case. O'Brien entered into a contract with Barlow to furnish all material and perform all work in plastering a certain building then being erected by Barlow, for which O'Brien was to be paid $8000 in installments as the work progressed. O'Brien did not complete the work claiming he had been prevented from doing so by Barlow. On the other hand, Barlow contended O'Brien had abandoned the work and he was required to finish the job at a cost greater than the contract price. The court said that the last work done by O'Brien was one day less than five years before he brought suit; that the work to be performed by O'Brien for Barlow "was an entirety; that there was continuous place of work, consisting of a number of parts or items, to be performed, the statute of limitations does not begin to run upon the completion of each separate part or item, but upon the completion of the whole." We think that case is not in point. There O'Brien was to be paid for completing the job $8000, while in the case before us, plaintiff was to be paid by the piece, as and when the work on the pieces was completed. This is shown by plaintiff's testimony and by the method in which the business was conducted. We think the five year statute of limitations barred plaintiff's claim and therefore the court did not err in entering judgment in favor of defendant notwithstanding the verdict.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

40099

LUELLA P. ROOT (substituted for Nora O. Van Derslice, Executrix of the Estate of Walter J. Van Derslice, deceased),

Appellant,

v.

DANIEL B. WENTWORTH,

Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

305 I.A. 493

MR. PRESIDING JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

October 16, 1936, Nora P. Van Derslice, Executrix of the Estate of Walter J. Van Derslice, plaintiff, brought suit against Daniel B. Wentworth, claiming that on September 11, 1926, at Chicago, Illinois, defendant made a promissory note in writing bearing that date and delivered the same to Walter J. Van Derslice and thereby for value received promised to pay to the order of said Walter J. Van Derslice the sum of $10,000.00 sixty days after date thereof with interest thereon at the rate of 7 per cent. per annum.

Plaintiff further alleges that defendant has defaulted in the payment of said note and such default still continues; that there is due plaintiff from defendant on said note $8,484.11, being $5,000.00 principal and $3,484.11 for interest at the rate aforesaid.

A cognovit was filed by the attorney for defendant, waiving service of process, confessing the action of plaintiff for the above named amount, being principal and interest on said note and also such attorneys' fees as the court may allow.

Thereafter on October 19, 1936, an order was entered by Judge Kelly, directing that judgment with execution be entered for plaintiff and against defendant for $8,900.88 and costs, which

The plaintiff (petitioner) herein, Hans P. Von Jeerlion, appealed the opinion of the court.

October 12, 1898, Hans P. Von Jeerlion, plaintiff, brought suit against Walter S. Fortnerth, claiming that on September 11, 1898, at Chicago, Illinois, defendant made a promissory note in writing bearing that date and delivered the same to Walter J. Von Jeerlion and thereby for value received promised to pay to the order of said Walter J. Von Jeerlion the sum of $4,000.00 sixty days after date thereof with interest thereon at the rate of 7 per cent. per annum.

Plaintiff further alleges that notwithstanding the demand in the payment of said note and such default still continues; that there is due plaintiff from defendant on said note $8,481.22, being $8,000.00 principal and $3,484.11 for interest at the rate aforesaid.

A judgment was filed by the attorney for defendant, waiving service of process, confessing the action of plaintiff for the above named amount, being principal and interest on said note and also said attorney' fee as the court may allow.

Thereafter on October 18, 1898, an order was entered by Judge Kelly, directing that judgment with execution be entered for plaintiff for the sum of $8,000.00 and costs. [illegible]

The defendant (petitioner) herein, Louis E. Kellner, appealed the opinion of the court.

sum includes $306.71 as attorneys' fees.

On November 18, 1936, the limited and special appearance of defendant, by his attorneys, was filed for the sole purpose of making defense as of said date and not for the purpose of giving any jurisdiction over the person or property of said defendant prior to said date or waiving any defenses defendant has to the jurisdiction of the courts prior to his motion to open and set aside said judgment as being void and without merit.

On December 4, 1936, Judge Bristow entered an order directing that said judgment by confession be opened and giving leave to defendant to file instanter his answer to the complaint; directing that said judgment stand as security; that execution be stayed until further order of the court, and that plaintiff have leave to file instanter a demand for a trial by jury. On December 5, 1936, plaintiff filed a demand for a jury.

On January 22, 1937, on motion of plaintiff, Judge Bristow entered an order striking defendant's answer and ordering defendant to file an amended answer on or before February 1, 1937.

Defendant in his amended answer filed February 8, 1937, admits that on September 11, 1926, at Chicago, Illinois, he made a certain promissory note in writing, bearing said date, for the sum of $10,000.00, with interest at the rate of seven per cent per annum, and delivered the same to Walter J. Van Derslice, but denies that he received any value or consideration for said note; alleges that the supposed promissory note of the defendant has been paid in full by the Ironwood Syndicate, and Indiana Corporation, said corporation being the real debtor, beneficiary and recipient of all the consideration for which said note was delivered; that said payment

was instituted [illegible] in attorneys' fees.

On November 18, 1970, the limited and special appearance of defendant, by his attorneys, was filed for the sole purpose of moving defendant to set aside and vacate for the purpose of giving any jurisdiction over the person or property of said defendant prior to said date or waiving any dilatory defendant has to the jurisdiction of the courts prior to his motion to quash and set aside said judgment as being void and without merit.

On December 4, 1970, Judge Hudson entered an order directing that said judgment by confession be opened and giving leave to defendant to file handwriting the manner in the complaint; directing that said judgment stand as security; that execution be stayed until further order of the court, and that plaintiff have leave to file instanter a demand for a trial by jury. On December 8, 1970, plaintiff filed a demand for a jury.

On January 22, 1971, on motion of plaintiff, Judge Trilla-ka entered an order striking defendant's answer and requiring defendant to file an amended answer on or before February 2, 1971.

Defendant in his amended answer filed February 6, 1971, admits that on September 13, 1969, at Akron, Ohio, he made a certain promissory note in writing, bearing well date, for the sum of $[illegible], with interest at the rate of seven per cent per annum, and delivered the same to Yakim d. the payee, for value that in receipt any value or consideration for said note; denies that the alleged promissory note of the defendant has been paid in full by the Internal Revenue Service, and Indiana Department, and everything being the said debtor, Insurance and employees of all the aforementioned the state said note has satisfied; that said account

in full of said note consisted of the payment of $5,000.00 in cash by said Ironwood Syndicate to plaintiff's testator, and by the issuance to plaintiff's testator of $5,000.00 worth of stock of said Ironwood Syndicate, said stock being received and accepted by plaintiff's testator in lieu of the balance due on said note; that said stock was issued and accepted with a presumed understanding that the plaintiff's testator might have the right to surrender said stock when said Syndicate was in a position to re-purchase the same; that the supposed promissory note of defendant aforesaid, was presumed to have been surrendered and destroyed on the issuance and acceptance of said stock by plaintiff's testator and that defendant assumed this had been done, until he was advised to the contrary, some time after the demise of plaintiff's testator; that defendant received no part or benefit of the consideration for which the promissory note sued upon herein was delivered; that the Ironwood Syndicate paid said promissory note in full, as aforesaid, $5,000.00 in cash and $5,000.00 in stock as will more fully appear in the records of the Ironwood Syndicate and by witnesses having knowledge thereof.

Defendant's amended answer further alleges that the supposed promissory note of defendant was only conditional; that when said note was executed and delivered by him, certain persons, including plaintiff's testator and defendant were interested in procuring title to some 400 acres of land in Gary, Indiana, for the purpose of forming a corporation, to be known as the Ironwood Syndicate, through which said land was to be subdivided and sold; that said group of persons were raising money at that time, for the purpose of purchasing title to said property; that plaintiff's testator agreed to be one of the original investors and agreed to advance the sum of $10,000.00 to the proposed syndicate for such

in full of said note constituted of the payment of $3,000.00 in cash by said Leonard Spriggins to Plaintiff's testator, and by the issuance to Plaintiff's testator of $3,000.00 worth of stock of said Leonard Spriggins, said stock being credited and accepted by Plaintiff's testator in lieu of the balance due on said note; that said stock was issued and accepted with a promised understanding that the Plaintiff's testator might have the right to surrender said stock back to said Spriggins and in a position to pre-purchase the money that the supposed promissory note of defendant Spriggins, was presumed to have been extinguished and destroyed on the issuance and acceptance of said stock by Plaintiff's testator and that defendant Spriggins had been done, until he was advised by his attorney, some time after the death of Plaintiff's testator, that defendant Spriggins on part or behalf of the corporation for which the promissory note had been issued was contrarily that the Leonard Spriggins took said promissory note in full, or alternatively $3,000.00 in cash and $3,000.00 in stock he will more fully represent in the records of the Leonard Spriggins and by witnesses having knowledge thereof.

Defendant's counsel whose further allegations that the supposed promissory note of defendant was only conditionally that when said note was executed and delivered by him, certain persons, including Plaintiff's testator and defendant were interested in procuring title to some due amount of land in Gary, Indiana, for the purpose of forming a corporation, to be known as the Leonard Spriggins, through which Spriggins is substituted and said that said land was never secured making a fact true, for the purpose of procuring title to said property; that Plaintiff's testator agreed to be one of incorporators and agreed to advance the sum of $10,000.00 to the proposed corporate for such

purpose, upon the condition, however, that he would receive a guarantee of reimbursement in case the said proposed Ironwood Syndicate should fail to incorporate, or if said Syndicate should fail to obtain title to said land under some form of organization for such purpose; that plaintiff's testator and defendant, as well as all the other original incorporators of the Ironwood Syndicate, knew of the foregoing conditions upon which the consideration for said note was based, and knew that said advancement of $10,000.00 was not for the use of defendant but for the use of the proposed Syndicate in obtaining title to the land aforesaid.

Defendant's amended answer further alleges that in consideration of said advancement of said $10,000.00 by plaintiff's testor to the proposed Syndicate, it was tentatively understood by the original incorporators of said Syndicate, that deceased, by reason of said advancement, should receive a bonus of $5,000.00, to be paid out of the first profits of said Syndicate; that on May 26, 1927, the proposed Ironwood Syndicate aforesaid was in fact incorporated under the laws of the State of Indiana, and that shortly thereafter said Ironwood Syndicate acquired title to the 400 acres of land, for which purchase of land plaintiff's testator had advanced the aforesaid sum of $10,000.00; that all obligations of defendant upon which said note was conditioned, were thereby fully performed and satisfied and defendant was released of all personal liability on said note.

Defendant's amended answer further alleges that, for a further and separate defense, the cause of action stated in the complaint did not accrue to plaintiff at any time within ten years next before the commencement of this action; that the supposed promissory note of defendant herein sued upon is dated September 11, 1930; that said note is in words and figures as alleged by plaintiff and contained a warrant of attorney to confess judgment " at any time hereafter"; that at the time of the filing of the declaration herein

purpose, upon the condition, however, that he would receive a guarantee of reimbursement in case the oil physical Tenneco dynamite should fail to transporate, or if oil quantities should fail to obtain title to said land under some form of organization for such purpose; that plaintiff's testimony not defendant, as well as all the other original incorporators of the Tenneco dynamite, knew of the incorporating conditions upon which the consideration for said note was based, and knew that said alienement of $10,000.00 was not for the use of defendant but for the use of the proposed dynamite in obtaining title to the land aforesaid.

Defendant's counsel answer further alleges that in consideration of said alienement of said $10,000.00 by plaintiff's tenor to the proposed dynamite, it was tacitly understood by the original incorporators of said dynamite, that defendant, by reason of said alienement, should receive a bonus of $5,000.00, to be paid out of the first profits of said dynamite; that on May 28, 1927, the proposed Tenneco dynamite aforesaid was in fact incorporated under the laws of the State of Delaware, and that shortly thereafter said Tenneco dynamite obtained title to the due bores of land, for which purchase of land plaintiff's tenor had alienated the aforesaid sum of $10,000.00; that all obligations of defendant upon which said note was conditioned, were thoroughly fully performed and satisfied and defendant was released of all personal liability on said note.

Defendant's counsel above further alleges that, for a further and separate defense, the owner of action stated in the complaint did not assume to plaintiff at any time within the years next before the commencement of this action; that the alleged promissory note of defendant herein sued upon is dated October 21, 1926; that said note is in words and figures as alleged by plaintiff and contained a warrant of attorney to confess judgment " at any time

no cause of action existed under said alleged note, in that such cause of action was barred by the Statute of Limitations on September 11, 1936; that no action was brought by plaintiff or her testator against defendant upon said note until the filing of this suit on October 16, 1936, and that no circumstances exist whereby the running of the Statute of Limitations would be tolled, and that by virtue of the foregoing facts plaintiff's action herein is barred.

Defendant's amended answer further states that on October 19, 1936, judgment was confessed by plaintiff against defendant upon the aforesaid supposed promissory note of defendant; that no summons was ever issued and no jurisdiction was obtained over defendant by his appearance or otherwise, prior to the running of the Statute of Limitations against said alleged note; that defendant never consented to the entry of the judgment by confession aforesaid; that until November 18, 1936, no lawful appearance was entered herein by defendant and no summons was issued herein; that said power of attorney, by virtue of the Statute of Limitations, had expired ten years after its execution, on September 11, 1936.

Defendant's amended answer states that for a further and separate defense, the said supposed promissory note of defendant was found among some miscellaneous papers belonging to plaintiff's testator at the time of his demise; that for many years prior to the death of plaintiff's testator, defendant and plaintiff's testator had been office associates and had numerous financial dealings involving debits and credits of both parties, that during all of said intervening time, plaintiff's testator never made any demand, directly or indirectly upon defendant, either orally or in writing for said $10,000.00, as mentioned in said note, or for any part thereof, or for any interest thereon; that said facts were known to plaintiff and that said note was

described in her inventory of her husband's estate, as "value doubtful"; that defendant verily believes that plaintiff personally knew of the interest of her deceased husband in the 640 acres of land in Gary and of the Ironwood Syndicate, which was incorporated for the purpose of subdividing and developing said land, because plaintiff drove by said land with her husband, since deceased, many times and investigated the improvements being made thereon.

Defendant's amended answer further sets forth that by reason of the failure of plaintiff's testate to have made any demand upon defendant under the alleged note sued upon herein, when accountings were made between said deceased and the defendant, and by reason of the fact that during his lifetime, deceased directed all his demands concerning said note, to the Ironwood Syndicate, defendant was led to believe and did rely upon a presumption that said note was canceled when the conditions upon which it was delivered were fully performed and satisfied by payment of $3,000.00 in cash and the delivery and acceptance of stock of the Ironwood Syndicate of the face and then market value of $5,000.00; that by virtue of all the acts and conduct of plaintiff's testator during his lifetime, defendant was lulled into inaction and took no steps to secure the return of, or to seek proof of the actual cancellation of said note; wherefore plaintiff is estopped from any attempt to bring this note to life and to take judgment thereon.

A motion was filed February 16, 1938, by Luella F. Root, by her attorneys, for an order substituting her as party plaintiff in said cause and likewise substituting her attorneys for the attorneys who had represented the original plaintiff. This notice, it is alleged, was entered in accordance with an affidavit, but said affidavit does not appear either in the abstract or in

Counsel in her inventory of her husband's estate, as "value doubtful". The defendant would believe that plaintiff personally knew of the interest of her deceased husband in the due notes of land in Gary and of the Transport Syndicate, which was incorporated for the purpose of subdividing and developing said land. Because plaintiff chose to sue Jane qui tam Bankers, alone defendant, may there not investigated the transactions being made therein.

Defendant's counsel cannot deny and does not deny that by reason of the failure of plaintiff's bankers to note that any payment upon defendant upon the alleged note was made upon instructions, accountings were made between said Lancaster and the defendant, and by reason of the fact that during his lifetime, Lancaster imported all his domestic accounting work into, to the Transport Syndicate, defendant was led to believe and did rely upon a presumption that said note was cancelled when the certificate upon which it was delivered were fully paid and satisfied by payment of $3,000.00 in cash and the delivery and surrender of stock of the Transport Syndicate of the face and then market value of $3,000.00; that by virtue of all the acts and conduct of plaintiff's testator during his lifetime, defendant was lulled into inaction and took no steps to secure the return of, or to seek proof of the actual cancellation of said note; wherefore plaintiff is estopped from her attempt to enforce this note in lieu and to take judgment thereon.

A motion was filed February 16, 1930, by counsel for plaintiff, for an order authorizing her as poor person for suit in said court and filing defendant's for attorney fee. The attorney who had represented the original plaintiff. This motion, if he alleged, was opposed in accordance of it, on affidavit, but such affidavit does not answer either in the affirmed or in

the record, so we are uninformed as to how the now plaintiff, Luella F. Root, obtained either the note or the consideration given therefor. We think these facts or documents should have been submitted to this court for consideration. After a trial by a judge and jury on the issues made by the original declaration and answer, as amended, the jury returned a verdict for $5,000.00. Just what this verdict was based upon in the way of evidence, the record before us does not disclose. It is, so obviously, a compromise verdict by the jury that any further comments thereon are unnecessary.

We think the trial court was wrong in refusing to permit the defendant to testify, as no estate and no heir as such, is a party to the litigation and had no interest in it at the time of the trial.

As was said in Gage v. Eddy, 179 Ill. 492, at page 498:

> "The defendant here was not defending as trustee, conservator, executor or administrator, nor as heir, devisee or legatee of any deceased person, nor as guardian or trustee of any such heir, legatee or devisee. Gage was defending in his own right, as grantee of the executor of the estate of Isaac N. Arnold. The statute cannot, by any fair or reasonable construction, be held to apply to the grantee of an executor, heir or devisee." Faulkner v. Gillon, 211 Ill. App, 348; Leach v. Nichols, 66 Ill. 273; Canfield v. Flummer, 212 Ill. 541.

It is quite apparent that the only issue then to be considered was whether or not there was a defense to the original judgment which was entered. The proper practice is to enter a judgment either for the plaintiff or for the defendant. As was said in Schrader v. Heflebower, 243 Ill. App. 139, at page 142:

> "Where a judgment by confession has been opened and a trial had, and the issues found for the plaintiff, the proper practice is to restore the judgment by confession and not enter an independent judgment." Bowers v. Heflebower, 243 Ill. App. 139; Excelsior Co. v. Venturelli, 290 Ill. App. 303.

the record, so we are satisfied as to how the new plaintiff, Emelia V. Hunt, obtained either the note or the conveyance given therefor. We think these facts or circumstances should have been submitted to the court for consideration. After a trial by a judge and jury on the issues made by the pleadings, defendants and appellees, as amended, the jury returned a verdict for $3,000.00. Just what this verdict was based upon in the way of evidence, the record before us does not disclose. It is, at least, a conjectural verdict by the jury that our foregoing comments thereon are unnecessary.

We think the trial court was wrong in refusing to permit the defendant to testify, in his own and in their behalf, in a suit in the litigation and that so followed in it as the rule of the world.

As we said in Hunt v. Hunt, 144 Ill. App. 1, at page 4:

"The defendant had the right of testifying as a witness, generally, whether or substantially, one in law, defense or injuries or for business reasons, or on grounds or grounds of any such kind, simple or direct. Thus one, defendant in his own right, as grantee of the warranty of the people of Texas v. Jones. The statute cannot, by any fair or reasonable construction, be held to apply to the owners of an equity, but or defense." Indeed v. Hunt, 111 Ill. App. 321; Hunt v. Hunt, 90 Ill. 271; Dunlap v. Hunter, 111 Ill. 301.

It is quite apparent that the only harm than to be sustained was whether or not there was a defense to the original judgment which was entered. The proper practice is to enter a judgment either for the plaintiff or for the defendant. As was said in Johnson v. McCormick, 201 Ill. App. 139, at page 141:

"Where a judgment by confession has been opened and a trial had, and the issues found for the plaintiff, the proper practice is to revoke the judgment by confession and enter a substituted judgment." Hunter v. McCormick, 201 Ill. App. 141; Hunter v. McCormick, 201 Ill. App. 142.

These errors which were committed by the trial court were corrected by the subsequent action of the trial court in vacating the judgment and entering a judgment notwithstanding the verdict in favor of the defendant.

When evidence was offered by the defense, even with the restriction placed upon it by the rulings of the trial court in refusing to permit the defendant to explain the circumstances of the transaction, for which we think he qualified as a competent witness, no reply was offered by the plaintiff to sustain her position. The defense was a complete one, both as to the facts and the law applicable thereto.

As was said in Kelly v. Jones, 290 Ill. 375, at page 378:

> "But there was no question of weighing the testimony of the complainant against contradiction, since there was no contradiction whatever of the facts testified to. Where the testimony of a witness is uncontradicted, either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected. (Larson v. Glos, 235 Ill. 284.)" Morris v. Carroso, 292 Ill. App. 620.

Plaintiff evidently relied solely upon the introduction of the note sued upon as evidence such as would entitle her to a recovery. The presumption of its value as a binding obligation disappeared when the affirmative defenses were established by uncontradicted evidence. Lohr v. Barkmann,Co., 335 Ill. 335; Nelson v. Stutz, 341 Ill. 387. When these affirmative defenses are neither contradicted nor explained, it becomes the duty of the trial court to direct a verdict for the defendant. Fuller v. DePaul Univ., 293 Ill. App. 261; Wallner v. Chicago Traction Co., 245 Ill. 148.

We think from a review of the evidence, there was no evidence remaining which sustained the allegations of the declaration, as the evidence offered on behalf of the defense completely eliminates plaintiff's right to recovery. That being true, it

These errors which were committed by the trial court were corrected by the subsequent action of the trial court in vacating the judgment and entering a judgment notwithstanding the verdict in favor of the defendant.

When evidence was offered by the defense, even with the restriction placed upon it by the rulings of the trial court in refusing to permit the defendant to explain the circumstances of the transaction, for which we think he qualified as a competent witness, no reply was offered by the plaintiff to sustain her position. The defense was a complete one, both as to the facts and the law applicable thereto.

As was said in Kelly v. Jones, 220 Ill. 378, at page 379:

> "But there was no question of weighing the testimony of the conflicting opinions contradicting, since there was no contradiction whatever of the facts testified to. Where the testimony of a witness is uncontradicted, either by positive testimony or circumstances, and is not inherently improbable, it cannot be disputed. (Lyman v. Lane, 197 Ill. 324.)" Morrill v. Lawrence, 237 Ill. 490, 495.

Plaintiff evidently relied solely upon the introduction of the note sued upon as evidence such as would entitle her to a recovery. The presumption of its value as a binding obligation disappeared when the affirmative defenses were established by uncontradicted evidence. Lehn v. Kirkman Co., 232 Ill. 428; Nelson v. Stein, 241 Ill. 387. When these affirmative defenses are neither contradicted nor explained, it becomes the duty of the trial court to direct a verdict for the defendant. Miller v. Ewing, 202 Ill. App. 188; Miller v. Kirkman Trading Co., 240 Ill. 448.

In light from a review of the evidence, there was no evidence remaining which sustained the allegations of the declaration, as the evidence offered on behalf of the defense completely eliminates plaintiff's right to recovery. That being true, it

was the duty of the trial judge to enter a judgment *non obstante veredicto*, and in so doing the trial court committed no error.

For the reasons herein given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

40941

In Re Estate of
HARRIET A. MITCHELL,
Deceased,

EDWARD GUERIN,
Plaintiff-Appellant,
v.
HAZEL M. GRIEFEN,
Defendant-Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

305 I.A. 494

MR. PRESIDING JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

Edward Guerin, a brother of Harriet A. Mitchell, deceased, brings this appeal as one of her heirs-at-law and next of kin, from an order entered in the Circuit Court of Cook County on April 19, 1939, admitting to probate an unexecuted copy of a purported will of said Harriet A. Mitchell, as and for her last will and testament. This appeal is taken from the same order as was entered in the Probate and Circuit Courts in the cause entitled, Appellate Court No. 40940, In re Estate of Harriet A. Mitchell, Deceased, - Marie Campbell, Anna Bonnewitz, Harriet Helpole and Minnie Clancy, Plaintiffs-Appellants, v. Hazel M. Griefen, Defendant-Appellee, in which case we have today filed an opinion affirming the order of the Circuit Court, which court affirmed the action taken in the Probate Court.

Inasmuch as the facts and the law are the same in this case as in Case No. 40940, heretofore referred to, the decision in the instant case will be the same.

Therefore, for the reasons herein given, the judgment and order of the Circuit Court is hereby affirmed.

JUDGMENT AND ORDER AFFIRMED.

MEBEL AND BURKE, JJ. CONCUR.

40942

In Re Estate of
HARRIET A. MITCHELL,
Deceased,

GEORGE P. GARIN,
Plaintiff-Appellant,

v.

HAZEL M. GRIFFEN,
Defendant-Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

305 I.A. 494 2

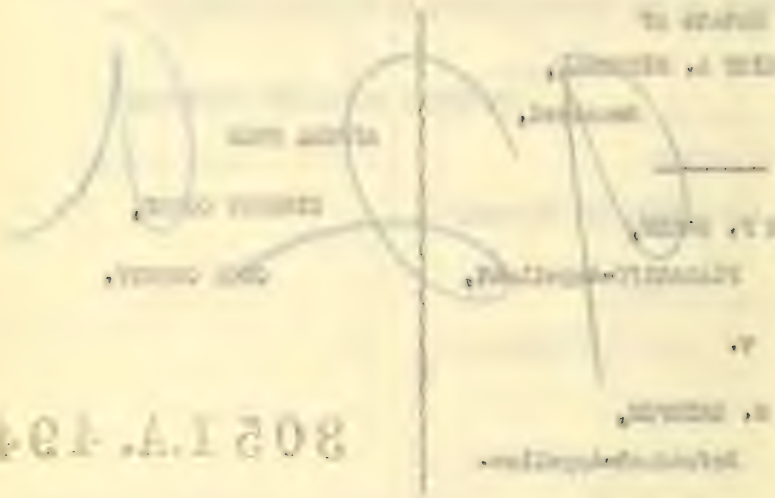
MR. PRESIDING JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

George P. Garin brings this appeal from an order entered in the Probate and Circuit Courts in admitting to probate the will in the Estate of Harriet A. Mitchell, Deceased. An order was entered in the Circuit Court consolidating this cause with two other causes, viz., Appellate Court Case No. 40940 and 40941, respectively. We have today filed an opinion in cause No. 40940 which is controlling in cause No. 40941. But, as no briefs or abstract were filed in this cause, we are dismissing the appeal for failure to comply with the rules of this court.

This cause was taken on briefs and abstract to be filed November 24, 1939. Inasmuch as no briefs or abstract have been filed on behalf of this appellant and no extension of time having been asked for or granted, because of such violation of the rules of this court said appeal is hereby dismissed.

APPEAL DISMISSED.

HEBEL AND BURKE, JJ. CONCUR.



40988

EDWARD L. SMITH and EMMA OLSON SMITH,

Plaintiffs - Appellees,

v.

A. SALAVITCH AND SON, INC., a corporation and JAMES TOPP, et al.,

Defendants - Appellants.

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EDWARD L. SMITH, Administrator of the Estate of E. W. SMITH, Deceased,

Plaintiff - Appellee,

v.

A. SALAVITCH AND SON, INC., a corporation and JAMES TOPP, et al.,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

305 I.A. 495

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

The defendants A. Salavitch and Son, Inc., a corporation, and James Topp, et al., bring this appeal from judgments entered in the Superior Court, this being a case of trespass on the case for personal injuries, wherein three judgments were entered on the verdicts of a jury, as follows: One judgment in the sum of $4,000 in favor of Edward L. Smith as Administrator of the estate of E. W. Smith, $500 in favor of Edward L. Smith and $1,500 in favor of Emma Olson Smith.

It appears that on August 3, 1936, about 3:30 A. M., at the intersection of York Road and Grand Avenue, about two miles north of Elmhurst, Illinois, an automobile which belonged to Edward L. Smith and which was driven by his father, Edward W. Smith, a man 37 years of age, collided with a truck at said intersection; that the truck with which said automobile collided was driven by the defendant James Topp; that said accident resulted in the death of Edward W. Smith and injuries were sustained by Emma Olson Smith, his wife, and Edward L. Smith, his son.

It further appears that when the accident occurred it was

EDWARD I. SMITH and ELSIE SMITH SMITH,

Plaintiffs - Appellees,

v.

1. DELAVIGNE INC SON, INC., a corporation,
and JAMES TOOT, et al.,

Defendants - Appellants.

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EDWARD I. SMITH, Administrator of the Estate
of E. V. SMITH, Deceased,

Plaintiff - Appellee,

v.

1. DELAVIGNE INC SON, INC., a corporation
and JAMES TOOT, et al.,

Defendants - Appellants.

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EDWARD I. SMITH, Administrator of the Estate
of E. V. SMITH, Deceased,

Plaintiff - Appellee,

v.

1. DELAVIGNE INC SON, INC., a corporation
and JAMES TOOT, et al.,

Defendants - Appellants.

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BEFORE: PRESIDING JUSTICE JONES E. BRILLIANT DELIVERED THE
OPINION OF THE COURT:

The defendants A. Delavigne and Son, Inc., a corporation, and James Toot, et al., bring this appeal from judgments entered in the Superior Court, this being a case of trespass on the case for personal injuries, wherein three judgments were entered on the verdicts of a jury, as follows: One judgment in the sum of $8,000 in favor of Edward I. Smith as administrator of the estate of E. V. Smith, $500 in favor of Edward I. Smith and $1,500 in favor of Anna Elsie Smith.

It appears that on August 1, 1980, about 8:30 A. M., at the intersection of York Road and Grand Avenue, about two miles north of Elmhurst, Illinois, an automobile which belonged to Edward I. Smith and which was driven by his father, Edward W. Smith, a man 82 years of age, collided with a truck of said defendants; that the truck with which said automobile collided was driven by the defendant James Toot; that said accident resulted in the death of Edward V. Smith and injuries were sustained by Elsie Elsie Smith, his wife, and Edward I. Smith, the seat.

It further appears that when the accident occurred it was

a clear moonlight night; that the said Edward G. Smith who was killed, had prior to that time been employed for approximately 12 years as manager of the stock department of Alfred Decker & Cohen Company; that said Edward G. Smith was driving said automobile in a southerly direction on York Road at 40 to 45 miles an hour; that his wife was sitting beside him and was asleep; that his son Edward, age 20, who as heretofore stated, was the owner of the automobile, was sitting beside his mother with his arm around the back of the seat; that they had spent the week-end with relatives at Oconomowoc, Wisconsin, and, because of the crowded condition of traffic on Sunday evening, had started from Oconomowoc at 11:00 P.M.; that it was approximately 106 miles from Oconomowoc to Elmhurst; that the Smiths had, therefore, been on the road some three and a half hours and had traveled about 104 miles; that the car, a Ford V-8 coupe, was two months old and in perfect condition.

It further appears that York Road was a through street protected not only by stop signs but also by warning signs; that the intersection where the accident occurred is not within any city limits; that Grand avenue at the place in question was a country road, macadamized gravel to the east, and gravel to the west; that according to Smith it was not a traveled road and at the intersection the view was obstructed at the northeast corner by a cornfield which came, according to actual measurements, within 15 feet of the concrete; that there were no lights of any kind at the intersection.

It further appears that the defendant James Topo was operating a 17,000 pound vehicle 22 to 24 feet long and was proceeding in a westerly direction on Grand avenue; that this truck was dark green in color and was covered by a brownish black tarpaulin. It is claimed that this truck suddenly came out onto the highway in front of plaintiffs' southbound automobile, blocking off the entire road; that the driver of plaintiffs' automobile applied his brakes and swerved to the right but was unable to prevent the collision;

a clear moonlight night; that the girl Edward R. Smith who was killed, had prior to that time been employed for approximately 18 years as manager of the stock department of Alfred Walker & Sons Company; that said Edward R. Smith was driving said automobile in a southerly direction on York road at 40 to 45 miles an hour; that his wife was sitting beside him and was asleep; that his son Edward, age 20, who as hereinbefore stated, was the owner of the automobile, was sitting beside his mother with his arm around the back of the seat; that they had spent the week-end with relatives at Gaithersburg, Maryland, because of the congested condition of traffic on Sunday evening, had started from Gaithersburg at 11:30 P.M.; that it was approximately 104 miles from Gaithersburg to Elkhurst; that the Smiths had, therefore, been on the road some three and a half hours and had travelled about 104 miles; that the car, a Ford V-8 coupe, was two months old and in perfect condition.

It further appears that York Road was a through street protected not only by arc signs but also by warning signs; that the intersection where the accident happened is not within any city limits; that Grand Avenue at the place in question was a country road, macadamized, travel to the east, and travel to the west; that according to Smith it was not a travelled road and at the intersection the view was obstructed on the northwest corner by a corn field which, according to Federal measurements, stands 15 feet of the concrete; that there were no lights of any kind at the intersection.

It further appears that the defendant James Tom was operating a 17,000 pound vehicle 24 to 26 feet long and was proceeding in a westerly direction on Grand Avenue; that this truck was being driven in motor and was covered by a Bonding Blank Insurance. It is claimed that this truck suddenly came out onto the highway in front of plaintiffs' mortgaged automobile, blocking off the entire road; that the driver of plaintiffs' automobile applied his brakes and swerved to the right but was unable to prevent the collision;

that his left front and the right front of the defendants' truck opposite the cab and just behind the right front wheel crashed together and in the collision Mr. Smith was so injured that he died and his wife and son were injured.

Plaintiffs' case was predicated and pleaded upon a double theory of liability:

First, that the truck of the defendant had failed to stop for the through highway, and

Second, that if a stop was made, the defendant, acted in direct violation of Chapter 95-1/2A, Paragraph 34, Section 33, Cahill's Ill. Rev. Stats. 1933, which provides:

> "(3) [ * * * motor vehicles entering upon or crossing such highway shall come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give the right-of- way to motor vehicles upon such highway."

It is further claimed that defendants drove said truck immediately in front of plaintiffs' automobile.

Defendants contend that James Topp was a chauffeur for A. Salavitch and Sons, Inc., on August 3, 1936, and on that day was driving the defendants' truck loaded with produce from Chicago to Rockford, Illinois; that he had with him a boy named Joe whom he was taking to Rockford.

Defendants further contend that the truck was 24 feet long and 14 feet wide and that the combined weight of the truck and its contents was approximately 17,000 pounds; that the truck was 14 feet high and was a new one, about two weeks old; that the truck was green with cream-colored trimmings; that only a small portion of the panel of the truck showed because the entire truck was covered with a black or brown tarpaulin; that the driver James Topp had been a truck driver for 21 years and was a licensed chauffeur; that Topp had gone to bed at 2:30 Sunday afternoon and got up at 8:30 or 9:00 P.M.; that the truck had not been broken in and was being driven from 35 to 40 miles an hour before reaching the scene of the accident; that the

that his left front and the right front of the defendants' truck opposite the car and just behind the right front wheel crashed together and in the collision Mr. Smith was so injured that he died and his wife and son were injured.

Plaintiffs' case was predicated and pleaded upon a double theory of liability:

First, that the truck of the defendant had failed to stop for the through highway, and

Second, that if a stop was made, the defendant, acted in direct violation of Chapter VI-1/2, Paragraph 7, section 21, Ohio Gen. Code, 1939, which provides:

"(a) [illegible] motor vehicles entering or crossing a through highway shall come to a full stop on near the right-of-way line of such highway as possible and regardless of direction shall give the right-of-way to motor vehicles upon such highway."

It is further claimed that defendants drove said truck immediately in front of plaintiffs' automobile.

Defendants contend that James Fox was a chauffeur for A. Salavitch and Sons, Inc., on August 3, 1949, and on that day was driving the defendants' truck loaded with produce from Chicago to Rockford, Illinois; that he had with him a boy named Joe when he was taking to Rockford.

Defendants further contend that the truck was 14 feet long and 14 feet wide and that the combined weight of the truck and its contents was approximately 17,000 pounds; that the truck was 14 feet high and was a new one, about two weeks old; that the truck was green with green-colored trimming; that only a small portion of the panel of the truck above became the entire truck was covered with a black or brown tarpaulin; that the driver James Fox had been a truck driver for 23 years and was a licensed chauffeur; that Fox had gone to bed at 2:30 Sunday afternoon and got up at 8:30 or 9:00 P.M.; that the truck had not been broken in and was being driven from 1 to 15 miles an hour before reaching the scene of the accident; that the

last stop which Topp made was at Harlem and Grand avenues; that said Topp had made this same trip to Rockford on this route two or three times a week and was very familiar with the road and that he had crossed York Road about 200 times.

Defendants further contend that at the place where the accident occurred York Road is a two lane concrete slab, while Grand avenue is wider and made of macadam with an asphalt top dressing; that the accident occurred about 2:30 A. M. and the moon was shining bright; that the visibility was such that objects could be seen clearly from a distance of 300 to 400 feet; that the defendant Topp drove the truck to York Road and, knowing that it was a stop street, came to a stop about 3 feet west of the stop sign and at that point he could see in either direction for 400 or 500 feet; that he saw no cars coming and started to cross the road at a speed of from 2 to 7 miles an hour; that when the front end of the truck was 15 to 17 feet west of the west side of York Road he heard a crash and felt the smash of something which had collided with the side of the truck; that he had not put the car into second gear at the time of the collision; that the force of the impact was so great as to toss his truck to the south and turn it over against the telegraph pole at the southwest corner of the intersection; that he heard no horn, no screeching of brakes or other sounds before the collision.

When testifying the defendant Topp said that when he got out of the truck, it was lying on its right side, facing east; that before the collision the truck was on the right side of Grand avenue going north. (This evidently is an error as Grand avenue runs east and west.)

Defendant Topp further testified that when he looked at the truck he found that it had been struck at the cab on the right side.

As a result of the accident Edward G. Smith was killed. His wife received injuries consisting of broken bones and lacerations,

last step which Tony made was at Darien and Jones contends; that only Tony had made this same trip in reality on this route two or three times a week and was very familiar with the road and that he had crossed York Road about 40 times.

Defendants further contend that at the place where the incident occurred York Road is a two lane concrete slab, while Grand avenue is wider and made of macadam with no sidewalk top dressing; that the collision occurred about 8:30 A. M. and the sun was shining bright; that the visibility was such that objects could be seen clearly from a distance of 300 to 400 feet; that the defendant Tony drove the truck to York Road and, knowing that it was a busy street, came to a stop about 2 feet west of the stop sign and at that point he could see in either direction for 400 or 500 feet; that he saw no cars coming and started to cross the road at a speed of from 1 to 7 miles an hour; that when the front end of the truck was 15 to 17 feet west of the west side of York Road he heard a crash and felt the shock of something which had collided with the side of the truck; that he had not put the car into second gear at the time of the collision; that the force of the impact was so great as to cause his truck to the south and turn it over; that the telephone pole at the southwest corner of the intersection; that he heard no horn, no screeching of brakes or other warning before the collision.

When testifying the defendant Tony said that when he got out of the truck, it was lying on the right side, facing east; that before the collision the truck was on the right side of Grand avenue going north. (This evidently is an error as Grand avenue runs east and west.)

Defendant Tony further testified that when he looked at the truck he found that it had been struck at the cab on the right side.

As a result of the accident Edward F. Smith was killed, and with resulting injuries complaining of broken bones and lacerations,

while their son sustained a cerebral concussion, from which they have practically recovered.

When testifying the defendant Topp, driver of the truck, did not have a very clear idea as to his approach when entering the intersection at York Road while driving on Grand avenue. His testimony also was taken under the statute, prior to the suit, and it varied materially from the testimony which he gave while upon the witness stand. He testified that 'the front end of my car was just off York road, hitting the macadamized - -". Later on in his testimony he said, in answer to the question, "You mean it was just over the road?", "Yes; that is, about three-quarters ** I was clear, my across the center line already." When asked, "And your front end reached the west end of the concrete at the time the collision occurred, or not?" he answered, "Yes". When asked if he saw the headlight of any automobile coming down the road, he answered, "No, sir. Well, about 500 feet there is a little slope in the road, and you could not have seen it."

The defendant Topp when testifying as to the cornfield at the corner, in which the growing corn apparently obstructed the view, stated that "you could see over the cornfield." He also stated that, "You could see over it to a certain extent. It wasn't necessary, you could see in through the road, and through the edge of it." He further testified that when he approached the intersection he stopped three feet west of the stop sign; that he could see in either direction for 400 or 500 feet; that he saw no cars coming and started to cross the road at from 3 to 7 miles an hour.

Topp's testimony was contradictory and indefinite and the jury was well justified in disregarding much of it. It is quite evident that his intent and purpose was to avoid making any statement which would tend to show that he was in any way liable. With regard to the testimony of the driver of the truck, when he stated that he looked each way for a distance of 500 feet, it has been held that law will not give credence to testimony that one looked but did not see,

while their non-sustained a certain communication, from which they have practically recovered.

When testifying the defendant Tony, driver of the truck, did not have a very clear idea as to his approach when entering the intersection at Yost road while driving on Grand avenue. His testimony also was taken under the statute, prior to the suit, and it varied materially from the testimony which he gave while upon the witness stand. He testified that "the front end of my car was just off Yost road, hitting the motorcycle - -". Later on in his testimony he said, in answer to the question, "You mean it was just over the road?", "Yes; that is, about three-quarters *** I was alone, my orders his master time already." Then asked, "Did your front end reached the west end of the concrete at the time the collision occurred, or not?" he answered, "Yes". When asked if he saw the headlight of any automobile coming down the road, he answered, "No, sir. Well, about 500 feet there is a little slope in the road, and you could not have seen it."

The defendant Tony when testifying as to the conflict at the corner, in which the growing corn apparently obstructed the view, stated that "you could see over the cornfield." He also stated that, "You could see over it to a certain extent. It wasn't necessary, you could see in through the road, and through the edge of it." He further testified that when he approached the intersection he stopped three feet west of the stop sign; that he could see in either direction for 400 or 500 feet; that he saw no cars coming and started to cross the road at from 3 to 7 miles an hour.

Tony's testimony was contradictory and indefinite and the jury was well justified in disregarding much of it. It is quite evident that his intent and purpose was to avoid making any statement which would tend to show that he was in any way liable. With regard to the testimony of the driver of the truck, some be added that he tested more by the 5 minutes of 500 feet, it was also said that he will not give evidence to testimony that one looked but did not see,

when it is perfectly apparent that if a person had looked he must have seen. Lamson v. Jorjorian, 292 Ill. App. 431; Ill. Rev. Stat. 1933, ch. 95a, par. 34; Jones Ill. Stats. Ann. 85.039.

Due to the fact that the occupants of the Ford automobile sustained such severe injuries that the father, Edward W. Smith was killed and his wife and son were rendered unconscious, much of the testimony supporting plaintiff's case depends upon the testimony of the driver of the truck, James Topp. It is quite evident that had the driver of the truck complied with the requirements of the statute, the accident would not have occurred.

It has also been held in a similar case that in an action for damages resulting from a collision of an automobile, which was proceeding on State highway No. 41, with defendant's automobile, which, without stopping as required by Ill. Rev. Stat. ch. 95a, par. 34 (1), had entered such highway from a side road hidden in a deep cut, the liability of the defendant was clear. Lever v. Stiles, 264 Ill. App. 556, wherein a writ of certiorari was denied by the Supreme court; Fenn v. Barger, 264 Ill. App. 484; Santonyn v. Silver Lumber Co., 281 Ill. App. 364.

We think the evidence shows a reckless disregard for the rights of the plaintiffs in the action of the driver of the defendant's truck in driving into York Road in front of the oncoming automobile of plaintiffs without having given any notice, or without paying any attention to the approaching automobile which he must have seen. It is our opinion that this was the sole or proximate cause of the accident which resulted in the death of one person and serious injuries to the other two persons who were riding in the Ford automobile in question.

It is contended by appellant that the verdict is against the manifest weight of the evidence. We do not think this is true. There is much contradictory evidence on both sides and we do not think the verdict and judgment should be disturbed.

As was said in the case of Sears, Roebuck & Co. v. Mears

when it is perfectly apparent that if a person had looked he must have seen. Lowery v. Guisinger, 298 Ill. App. 491; Indiana Ill. App. 514, 1939, 24 N.E. (2) 1000 Ind. App. 22.

In view of the fact that the occupants of the ford automobile assumed such severe injuries when the driver, Edward S. Smith was killed and his wife and son were injured unconscious, much of the testimony supporting plaintiff's case depends upon the testimony of the driver of the truck, Owen Long. It is quite evident that had the driver of the truck complied with the requirements of the statute, the accident would not have occurred.

It has also been held in a similar case that in an action for damages resulting from a collision of an automobile, which was proceeding on state highway No. 41, with defendant's automobile, which without stopping or yielding by O'Neill's st. ch. 38, par. 34 (2), had entered such highway from a side road hidden in a deep cut, the liability of the defendant was clear. Lower v. Gilmore, 294 Ill. App. 238, wherein a writ of certiorari was denied by the Supreme court; Lower v. Gilmore, 294 Ill. App. 491; Gutowski v. Illinois Central R.R., 311 Ill. App. 484.

We think the evidence shows a positive disregard for the rights of the plaintiffs in the action of the driver of the defendant's truck in driving into York road in front of the oncoming automobile of plaintiffs without having given any notice, or without paying any attention to the approaching automobile which he must have seen. It is our opinion that this was the sole or proximate cause of the accident which resulted in the death of one person and serious injuries to the other two persons who were riding in the ford automobile in question.

It is contended by appellant that the verdict is against the manifest weight of the evidence. We do not think this is true. There is much contradictory evidence on both sides and we do not think the verdict and judgment should be disturbed.

As was said in the case of Ill.Cent. Railroad v. Smith

Slayton Lumber Co., 226 Ill. App. 287, at page 290:

> "For, if upon a consideration of the evidence in the record in a case in this court, we should be of the opinion that the evidence was evenly balanced, we could not, under the law, set aside the verdict because it is only where we find the verdict to be against the manifest weight of the evidence that we are authorized to disturb it. The question of preponderance does not arise at all in this court."

This case is peculiarly one wherein the verdict of the jury should not be disturbed without grave reasons therefor. Such testimony, as was here adduced, is the kind which should be submitted to a jury where the judgment of twelve men may take into consideration and pass upon the facts presented, the demeanor of the witnesses while upon the stand and thereby judge as to the credibility of such witnesses. The trial court is thus better fitted to judge as to wherein lies the greater weight of the evidence than is a court of review.

It is further claimed that plaintiffs were guilty of contributory negligence. The Supreme Court in the case of Blumb v. Oets, 332 Ill. 273, at page 277, said:

> "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case."

As to the contention of defendant with regard to other errors committed, we are of the opinion that no error was committed in ruling upon the evidence and the admission of hospital records, as well as the giving of the instruction complained of. We think a fair trial was had and that the court was justified in overruling the motion for a new trial and entering judgment on the verdict.

For the reasons herein given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

Chicago Lumber Co., 108 Ill. App. 487, at page 490:

"But, if upon a consideration of the evidence in the record in a case in this court, we should be of the opinion that the evidence was evenly balanced, we could not, under the law, set aside the verdict because it is only where so find the verdict is in opinion the manifest weight of the evidence that we are authorized to disturb it. The verdict of plaintiffs does not stand as all in this court."

This case is peculiarly one wherein the verdict of the jury should not be disturbed without grave reasons therefor. Such testimony, as we have adduced, is the kind which should be submitted to a jury which the judgment at trial was, by the administration was upon the facts presented, the demeanor of the witnesses while upon the stand and thereby judge as to the credibility of such witnesses. The trial court is thus better fitted to judge as to wherein lies the greater weight of the evidence than be a court of review.

It is further claimed that plaintiffs were guilty of contributory negligence. The Supreme Court in the case of Chase v. Cate, 108 Ill. App. 474, at page 477, said:

"The question of contributory negligence in one which is peculiarly a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is empaneled for the purpose of deciding this as well as the other questions in the case."

As to the contention of defendant with regard to other errors committed, we are of the opinion that no error was committed in ruling upon the evidence and the admission of hospital records, as well as the giving of the instruction complained of. We think a fair trial was had and that the court was justified in overruling the motion for a new trial and entering judgment on the verdict.

For the reasons herein given the judgment of the Superior Court is AFFIRMED.

ATTORNEY APPEARANCE.

MERRY AND JURIK, JJ. CONCUR.

41012

LAKE VALLEY FARM PRODUCTS, INC.,
a corporation,

Appellant,

v.

F. G. LAFERNO,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

305 I.A. 495[2]

MR. PRESIDING JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

Plaintiff brings this appeal from a judgment entered in the Municipal Court for $86.79 in favor of defendant. Plaintiff brought suit against defendant for the price of certain dairy products purchased by defendant from plaintiff in the sum of $113.71. Defendant filed an answer admitting said amount was due, and by way of set-off and counterclaim, alleged that plaintiff had breached a contract for the sale of milk between the parties and claiming to have sustained damages in the amount of $200.00. The judgment entered in the trial court for $86.79, is the difference between the $200.00 damages alleged and the $113.71, which plaintiff claims as due and owing it.

The evidence before us does not show there was a contract between the parties whereby plaintiff was to furnish milk to defendant. Several witnesses testified as to the damages sustained by defendant and the court entered judgment as stated above. These witnesses were permitted to testify that as a result of plaintiff's failure to furnish defendant with its products, defendant lost customers and sustained damages of $200.00. Other witnesses, testifying on behalf of plaintiff, stated that defendant had been asked to sign a written contract with plaintiff, but that defendant

had refused to do so, and as a consequence defendant did not receive any milk.

From the evidence presented for our consideration, there appears to be no legal basis upon which defendant could substantiate his counterclaim for $300.00 because of damages alleged to have been sustained. No contract is offered in evidence showing over what period of time plaintiff was to have furnished milk to defendant, the price to have been paid therefor, or other information showing an obligation on the part of the plaintiff to furnish defendant with said dairy products. Under the circumstances defendant has no legal basis upon which he could establish the damages alleged in his counterclaim and the trial court erred in allowing said counterclaim.

Inasmuch as defendant has admitted in his answer that he owes plaintiff $113.21, and there is no legal basis for the allowance of his counterclaim for $300.00, the judgment of the Municipal Court is hereby reversed and judgment is entered here in favor of plaintiff and against defendant for $113.21.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR PLAINTIFF FOR $113.21.

HEBEL AND BURKE, JJ. CONCUR.

had refused to do so, not as a contractual obligation but for reasons of self.

Prior the attorney presented the new evidence, there appears to be no legal basis upon which defendant could substantiate his counterclaim for fraudulent business of damages alleged to have been sustained. No contract is offered in evidence showing over what period of time plaintiff was to have furnished milk to defendant, the price to have been paid therefor, or other information showing an obligation on therefor of the plaintiff to furnish defendant with milk daily products. Upon the circumstances submitted the court finds upon which to rule upon the damages alleged in his counterclaim and the trial court erred in sustaining said counterclaim.

Inasmuch as determining has adjudged in his answer that he owes plaintiff $113.25, and there is no legal basis for the allowance of his counterclaim for damages, the judgment of the District Court is hereby reversed and judgment is entered herein in favor of plaintiff and against defendant for $113.25.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR PLAINTIFF AND $113.25.

Black and Smith, JJ., concur.

41000

FRANK SWEENEY,

Appellee,

v.

BISMARCK HOTEL CO., a corporation, THE FIRST NATIONAL BANK OF CHICAGO, a banking corporation, and CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a banking corporation,

Appellants.

95 A

APRIL TERM

CIRCUIT COURT

COOK COUNTY.

305 I.A. 496

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $4,943.80, entered against defendants in the Circuit Court of Cook County upon a directed verdict. The judgment represents damages for the conversion of a check dated June 23, 1936, drawn by the Chicago Title & Trust Company upon the City National Bank and Trust Company of Chicago, payable to "Frank S. Sweeney", which bore the alleged forged endorsement of the payee. Following the alleged forged endorsement appears the endorsement of the Bismarck Hotel Company reading "Pay to the order of the First National Bank". At the close of plaintiff's case, counsel for defendants announced that they did not intend to offer any testimony.

The record discloses that on May 2, 1936, an escrow agreement involving the real estate at 4013 Irving Park Boulevard, Chicago, was made. The Chicago Title & Trust Company was named as the escrowee. The agreement, provided that the funds be disbursed under the direction of the Sills Management and Mortgage Corporation. Subsequently, the Sills corporation instructed the escrowee in writing to "pay to Frank S. Sweeney" $4,943.80. Accordingly, on June 23, 1936, the Chicago Title & Trust Company drew a check on the City National Bank & Trust Company payable to "Frank S. Sweeney" for the amount indicated. D. I. Dunn was then vice president of the Sills corporation.

H. W. Owens, a vice president and escrow officer of the

PLAIN ENGLISH.

Appellees.

v.

ATLANTIC HOTEL CO., a corporation, THE FIRST NATIONAL BANK OF CHICAGO, a banking corporation, and CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a banking corporation,

Appellees.

305 I.A. 196

Mr. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment for $4,340.00, entered against defendants in the Circuit Court of Cook County upon a directed verdict. The judgment represents damages for the conversion of a check dated June 22, 1934, drawn by the Chicago Title & Trust Company upon the City National Bank and Trust Company of Chicago, payable to "Frank S. Sweney", which bore the alleged forged endorsement of the payee. Following the alleged forged endorsement appeared the endorsement of the Biltmore Hotel Company reading "Pay to the order of the First National Bank". At the close of plaintiff's case, counsel for defendants announced that they did not intend to offer any evidence.

The record discloses that on July 2, 1934, an escrow agreement involving the real estate at 4019 Irving Park Boulevard, Chicago, was made. The Chicago Title & Trust Company was named as the escrowee. The agreement provided that the funds be disbursed under the direction of the Hills Management and Mortgage Corporation. Subsequently, the Hills corporation instructed the escrowee in writing to "pay to Frank S. Sweney" $4,340.00. Correspondingly, on June 22, 1934, the Chicago Title & Trust Company drew a check on the City National Bank & Trust Company payable to "Frank S. Sweney" for the amount indicated. O. I. Dunn was then vice president of the Hills corporation.

H. F. Owens, a vice president and escrow officer of the

Chicago Title & Trust Company, testified that at the time the check was issued he was acquainted with the plaintiff and that he then understood that the Frank J. Sweeney named as payee was the same person who is the plaintiff herein. He further testified that he delivered the check to Dunn, who was connected with the Mills corporation at that time, and that plaintiff was not present at the time the check was delivered.

Plaintiff testified that he was engaged in the "real estate tax business;" that he undertakes for trust companies, banks and law firms and others to "outline the back due taxes owing on any particular piece of real estate and make our recommendation as to how savings can be effected legally so the Title & Trust Company will issue a guaranty title making the property merchantable again after having been cluttered up for many years;" that he was the sole owner of the business; that he employed from 10 to 17 employees; that one T. J. O'Mara was employed by him from September, 1936, until the latter part of June, 1936; that O'Mara received as compensation 30% of the net fees procured through his (O'Mara's) solicitation; that he enjoyed business relations with Dunn and the Mills corporation; that in connection with the property at 4019 Irving Park Boulevard, "we were called in by Mills Realty;" that Dunn telephoned O'Mara the latter part of April or the early part of May, 1936, with respect to a tax search on the Irving Park Boulevard property; that 300 or 400 proposals went out of his office each month, consisting of a tax search and a letter of recommendation as to how savings could be effected; that he did not learn that the check had been issued until the latter part of April or early in May, 1937; that he then examined the check and caused a notice to be served that his endorsement thereto was forged; that the endorsement on the check was that of T. J. O'Mara; that he did not authorize the latter to endorse the check and did not know that O'Mara was receiving it. On cross-examination, he testified that in soliciting the Mills corporation, O'Mara was

Chicago Title & Trust Company, testified that at the time the check was issued he was acquainted with the plaintiff and that he then understood that the Frank E. Sweeney named on page one was the same person who is the plaintiff herein. He further testified that he delivered the check to them, who was connected with the Hills corporation at that time, and that plaintiff was not present at the time the check was delivered.

Plaintiff testified that he was engaged in the "real estate tax business;" that he undertakes for trust companies, banks and law firms and others to "untangle the back due taxes owing on any particular piece of real estate and make our recommendation as to how savings can be effected legally as the Title & Trust Company will issue a certificate with making the property merchantable again after having been cluttered up for many years;" that he was the sole owner of the business; that he employed from 10 to 17 employees; that one T. J. O'Hara was employed by him from September, 1926, until the latter part of June, 1929; that O'Hara received an compensation 20% of the net fees procured through him (O'Hara's) solicitation; that he enjoyed business relations with Dunn and the Hills corporation; that in connection with the property at 4019 Irving Park Boulevard, "we were called in by Hills mainly;" that Dunn telephoned O'Hara the latter part of April or the early part of May, 1929, with request to a tax search on the Irving Park Boulevard property; that 200 or 400 prospects went out of his office each month, consisting of a tax search and a letter of recommendation as to how savings could be effected; that he did not learn that the check had been issued until the latter part of April or early in May, 1929; that he then examined the check and noticed a notice to be served that his endorsement thereto was forged; that the endorsement on the check was that of T. J. O'Hara; that he did not authorize the latter to endorse the check and did not know that O'Hara was receiving it. On cross-examination, he testified that in soliciting the Hills corporation, O'Hara was

acting as his (plaintiff's) agent, and that the Mills corporation hired his firm, acting through him (O'Mara).

Counsel for defendants stated to the court and jury that O'Mara, who had had the check, was a friend of the Comptroller of the Bismarck Hotel Company; that O'Mara handed the check to the Comptroller, who handed it to his assistant; that the latter went to the bank and had the check honored; that the money was obtained from the bank and brought over to the Bismarck Hotel Company and paid to O'Mara; that the reason the hotel company "happened to cash" the check was that the Comptroller knew O'Mara; that he (the Comptroller) did not notice the name of the payee on the check; that he (the Comptroller) did not require O'Mara to endorse the check and did not question it in any way; that when the Comptroller gave the check to his assistant, he thought the latter would require the endorsement of the person who was to get the money; that the assistant was under the misapprehension that the Comptroller "knew that O'Mara was Sweeney;" that as a consequence the check was cashed; that the check which was made out to Sweeney was, in reality, intended for O'Mara; that O'Mara was hired to do the work; that, in reality, O'Mara and not the plaintiff was the payee of the check, and the person intended to receive the money, and that O'Mara, and nobody else, was hired to do the work for which the money was given.

The first criticism leveled at the judgment is that the court should have granted defendants' motion for a directed verdict because of the failure of the plaintiff to prove his title to the check. The record shows that plaintiff, through the solicitation of his agent O'Mara, was employed to render certain services in connection with the taxes on the Irving Park Boulevard property; that an escrow agreement was made; that pursuant to that agreement the escrowee was directed to pay to plaintiff the amount of the check in controversy; that the check was drawn and delivered to an officer of the Mills corporation; that shortly thereafter the check was

[illegible] and that the title documents bind his firm, coming through him (O'Hara).

Counsel for defendants stated to the court and jury that O'Hara, who had had the check, was a friend of the "comptroller of the Hanover Hotel Company; that O'Hara handed the check to the comptroller, who handed it to his assistant; that the letter went to the bank and had the check honored; that the money was obtained from the bank and brought over to the Hanover Hotel Company and paid to O'Hara; that the reason the hotel company "happened to have" the check was that the comptroller knew O'Hara; that he (the comptroller) did not notice the name of the payee on the check; that he (the comptroller) did not require O'Hara to endorse the check and did not question it in any way; that when the comptroller gave the check to his assistant, he thought the latter would require the endorsement of the person who was to get the money; that the assistant was under the misapprehension that the comptroller "knew that O'Hara was Hanover;" that as a consequence the check was cashed; that the check which was made out to Hanover was, in reality, intended for O'Hara; that O'Hara was hired to do the work; that, in reality, O'Hara and not the plaintiff was the payee of the check, and the payee intended to receive the money, and that O'Hara, and nobody else, was hired to do the work for which the money was given.

The first criticism levelled at the judgment is that the court should have granted defendants' motion for a directed verdict because of the failure of the plaintiff to prove his title to the check. The record shows that plaintiff, through the activities of his agent O'Hara, was employed to render certain services in connection with the lease on the Irving Park Boulevard property; that an oral agreement was made; that pursuant to that agreement the securities were diverted to pay to plaintiff the amount of the check in controversy; that the check was drawn and delivered by an officer of the title corporation; that shortly thereafter the check was

cashed for O'Mara through the good offices of the Bismarck Hotel Company; that O'Mara endorsed the name of plaintiff to the check, and that O'Mara had no authority so to do. We are of the opinion that the proof establishes that plaintiff was the payee of the check, and that the Mills corporation, which controlled the escrow directions, intended plaintiff to be the payee.

The second point advanced by the defendants is that the court should have granted their motion for a directed verdict because of the failure of the plaintiff to prove that the check was delivered. The escrowee delivered the check to Mr. Dunn, an officer of the Mills corporation. At that time O'Mara was in the employ of plaintiff. The evidence shows that the check was delivered to O'Mara by Mr. Dunn. As O'Mara was then the agent of the plaintiff, delivery to him was delivery to plaintiff. Furthermore, plaintiff testified that in April or May, 1937, the canceled check was exhibited to him in the office of Fred Gardner, secretary and treasurer of the Mills corporation. It does not appear that the Mills corporation, which directed the issuance of the check, raised any question as to the delivery thereof. It will also be observed that in the statement which counsel for defendants made to the court and jury, he declared that his position was that in reality O'Mara and not Sweeney was hired to do the work. It is clear that the position of counsel for defendants, during the trial, was that the check was delivered to O'Mara, who having been hired and having done the work, had the right to endorse the same, and that in reality O'Mara and not Sweeney was the payee.

The third point urged by defendants is that the court erred in instructing a verdict for the plaintiff. That point has been fully answered in our discussion of the first two points.

Finally, defendants maintain that the court erred in admitting the check as an exhibit. Our discussion of the previous points makes it obvious that the court properly admitted the check.

For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

coupled for O'Hara through the good offices of the Hawaiian Safety Company; that O'Hara endorsed the name of plaintiff to the check, and that O'Hara had no authority so to do. It are of the opinion that the proof establishes that plaintiff was the payee of the check, and that the Hills corporation, which dishonored the account instructions, intended plaintiff to be the payee.

The second point advanced by the defendants is that the court should have granted their motion for a directed verdict because of the failure of the plaintiff to prove that the check was delivered. The evidence delivered the check to Mr. Dunn, an officer of the Hills corporation. At that time O'Hara was in the employ of plaintiff. The evidence shows that the check was delivered to O'Hara by Mr. Dunn. In O'Hara was then the agent of the plaintiff, delivery to him was delivery to plaintiff. Furthermore, plaintiff testified that in April or May, 1927, the canceled check was exhibited to him in the office of Ford Gardner, secretary and treasurer of the Hills corporation. It does not appear that the Hills corporation, which directed the issuance of the check, raised any question as to the delivery thereof. It will also be observed that in the ex tempore which counsel for defendants made to the court and jury, he declared that his position was that in reality O'Hara and not Sweeney was hired to do the work. It is clear that the machine of counsel for defendants, during the trial, was that the check was delivered to O'Hara, the driving boy hired and having done the work, but the right to endorse the check, and that in reality O'Hara and not Sweeney was the payee.

The third point urged by defendants is that the court erred in instructing a verdict for the plaintiff. That point has been fully answered in our discussion of the first two points.

Finally, defendants maintain that the court erred in admitting the check as an exhibit. Our discussion of the previous points makes it obvious that the court properly admitted the check.

For the reasons stated, the judgment of the circuit court of Oahu County is affirmed.

DEMERY, J. SUTTON, P.J. AND HERRS, J. DISSENTING.

41018

ROSE HATZENBUEHLER,

Appellee,

v.

ALFRED NISKE, RUTH B. NISKE, MINNA NISKE, LOUISE NISKE,

Appellants.

APPEAL FROM COUNTY COURT COOK COUNTY

96A

305 I.A. 496

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 12, 1939, the County Court of Cook County allowed plaintiff's motion to dismiss the appeal of the defendants from a judgment of a justice of the peace, and on July 1, 1939, denied defendants' motion to vacate the order of dismissal. This appeal seeks to review the action of the County Court in dismissing the appeal and in declining to vacate the dismissal order. The transcript of the justice of the peace shows that on April 22, 1939, plaintiff filed her complaint in forcible detainer and named Alfred Niske, Ruth B. Niske and Minna Niske as unlawfully withholding from her the possession of the premises therein named; that he issued a summons which was served on Alfred Niske, Ruth B. Niske and Minna Niske; that the defendants asked for and were granted a change of venue; that the case was tried on May 12, 1939, and resulted in a judgment that the plaintiff was entitled to the possession of the premises from "Alfred W. Niske, Ruth B. Niske, Minna Niske and Louise Niske;" that on May 16, 1939, he (the justice of the peace) declared the judgment, in so far as it affected Louise Niske, to be null and void, because she was not a party defendant and had not been served with summons. The transcript further recites that on May 17, 1939, "defendants all prayed an appeal to the County Court of Cook County, which was allowed upon the filing of a bond, which also included Louise Niske, in the sum of $100, and the payment of appeal fees." On May 17, 1939, an appeal to the County Court of Cook County was taken and approved before the justice of the peace. The bond recites that Isabelle Niske, Alfred

[illegible]

[illegible]

[illegible]

Miske, Ruth B. Miske and Minna Miske are bound unto the plaintiff in the penal sum of $100, and that the condition of the obligation is such that whereas, the plaintiff recovered a judgment against Alfred Miske, Ruth B. Miske and Minna Miske for the restitution of the described premises, and costs of suit, from which judgment Alfred Miske, Ruth B. Miske and Minna Miske have taken an appeal; that "now if the said Alfred Miske, Ruth B. Miske and Minna Miske shall prosecute their appeal with effect, and also [pay] all damages and loss which the said plaintiff may sustain * * * in case the judgment from which the appeal is taken is affirmed or appeal is dismissed, then the above obligation to be void; otherwise to remain in full force and effect." The bond is signed only by Isabelle Miske, the surety, and by Ruth B. Miske, one of the defendants. On May 31, 1939, plaintiff filed her special and limited appearance in the County Court for the purpose of "contesting the jurisdiction of the court." At the same time she filed a written motion which prayed that the appeal be dismissed. On the same day the defendants presented an oral counter motion, asking that a rule be entered on the justice of the peace to file an amended transcript, which motion was allowed. The motion of plaintiff to dismiss the appeal was continued, and on June 12, 1939, the County Court sustained plaintiff's motion and dismissed the appeal of Alfred Miske, Ruth B. Miske and Minna Miske. On June 27, 1939, the defendants and Louise Miske filed a written motion, praying that the court vacate the order dismissing the appeal. The motion was presented by attorneys Schachner and Siegan. The motion was accompanied by a petition, verified by one of defendants' attorneys. On July 1, 1939, the court denied the motion and petition to vacate the dismissal order. On July 20, 1939, attorneys Schachner and Siegan withdrew their appearance as attorneys for the defendants and Louise Miske, and attorney Lawrence Lenit entered his appearance in their stead. At the same time, they signed and filed a consent to the substitution of attorneys, which reads:

"We hereby consent to the withdrawal of Schachner and Siegan, our former

made, Ruth S. Hicks and Minna Hicks are bound unto the plaintiff in the penal sum of $100, and that the condition of the obligation is such that thereon, the plaintiff recovered a judgment against Alfred Hicks. Ruth S. Hicks and Minna Hicks for the restitution of the recorded premises, and costs of suit, from which judgment Alfred Hicks, Ruth S.Hicks and Minna Hicks have taken an appeal; that "now if the said Alfred Hicks, Ruth S. Hicks and Minna Hicks shall prosecute their appeal with effect, and also [pay] all damages and loss which the said plaintiff may sustain * * * in case the judgment from which the appeal is taken is affirmed or appeal is dismissed, then the above obligation to be void; otherwise to remain in full force and effect." The bond is signed only by Isabella Hicks, the surety, and by Ruth S. Hicks, one of the defendants. On May 22, 1928, plaintiff filed her special and limited appearance in the County Court for the purpose of "contesting the jurisdiction of the court," at the same time she filed a written motion which proposed that the appeal be dismissed. On the same day the defendants presented an oral counter motion, asking that a rule be entered on the justice of the peace to file an amended transcript, which motion was allowed. The motion of plaintiff to dismiss the appeal was overruled, and on June 12, 1928, the County Court sustained plaintiff's motion and dismissed the appeal of Alfred Hicks, Ruth S. Hicks and Minna Hicks. On June 27, 1928, the defendants had Lewis Hicks file a written motion, praying that the court vacate the order dismissing the appeal. The motion was presented by attorneys Schaffner and Hagan. The motion was accompanied by a petition, verified by one of defendants' attorneys. On July 1, 1928, the court denied the motion and petition to vacate the dismissal order. On July 20, 1928, attorneys Schaffner and Hagan withdrew their appearance as attorneys for the defendants and Louise Hicks, and attorney Lawrence Smith entered his appearance in their stead. At the same time, they filed and filed a consent to the substitution of attorneys, which reads:

"We hereby consent to the withdrawal of Schaffner and Hagan, our former

Attorneys, and consent to the filing of the appearance of Lawrence Lenit, as out future Attorney in the above entitled cause."

The first point we will consider is the contention that plaintiff should have served defendants with notice of the motion to dismiss the appeal. The record establishes that attorneys Schachner and Siegan appeared for the defendants and argued against the motion to dismiss. They also presented and argued the motion to vacate the order dismissing the appeal. Apparently, defendants' position is that the notice should have been served on them personally. The substitution of attorneys and the consent thereto shows clearly that Schachner and Siegan had authority to represent the defendants. As defendants were represented by attorneys of their own choosing, they cannot now successfully complain that they were not served with personal notice. Another point urged is that the justice of the peace had no power to change the judgment order by declaring the judgment against Louise Riske to be void because she was not a party, nor served with summons. The record does not show that this point was raised before the justice of the peace or in the County Court, and it cannot be raised for the first time in this court. Louise Riske was not a party, nor was she served with summons before the justice of the peace. The appeal bond filed with the Justice recognizes that she was not a party defendant. We do not understand how she can appeal when she is not a party and when there is no judgment against which she can complain.

The point on which defendants place chief reliance is that Section 180, chapter 79, Ill. Rev. Stat. 1939, provides that "no appeal from a justice of the peace shall be dismissed for any informality in the appeal bond, but it shall be the duty of the court before whom the appeal may be pending, to allow the party to amend the same within a reasonable time, so that a trial may be had on the merits of the case." An appeal from a justice of the peace must be prayed, and it is essential that the parties appealing file an adequate appeal bond. The defendants contend that under Section 180 it was the duty of the court to enter a rule on the defendants to amend the bond within a reasonable time. They argue

attorney, and consent to the filing of the stipulation of discontinuance herein, as our future attorney in the above entitled cause."

The first point we will consider is the contention that plaintiff should have served defendants with notice of the motion to dismiss the appeal. The record establishes that attorneys Dalkemper and Wagner appeared for the defendants and argued against the motion to dismiss. They also presented and argued the motion to vacate the order dismissing the appeal. Apparently, defendants' position is that the notice should have been served on them personally. The substitution of attorneys and the consent thereto show clearly that defendant and Wagner had authority to represent the defendants. As defendants were represented by attorneys of their own choosing, they cannot now successfully complain that they were not served with personal notice. Another point urged is that the jurisdiction of the trial court was lost when the judgment order by dismissing the judgment against Louise Blake to be void because she was not a party, nor served with summons. The record does not show that this point was raised before the justice of the peace or in the county court, and it cannot be raised for the first time in this court. Louise Blake was not a party, nor was she served with summons before the justice of the peace. The appellant bank filed with the justice requisites that she was not a party defendant. We do not understand how she can appeal when she is not a party and when there is no judgment against which she can complain.

The point on which defendants plaintiff rely in this instance is that section 180, chapter 79, Ill. Rev. Stat. 1939, provides that "no appeal from a justice of the peace shall be dismissed for any informality in the appeal bond, but it shall be the duty of the court before which the appeal may be pending, to allow the party to amend the same within a reasonable time, so that a trial may be had on the merits." In appeal from a justice of the peace must be proved, and it is essential that the parties appealing file an adequate appeal bond. The defendants contend that under section 180 it was the duty of the court to order a rule on the defendants to amend the bond within a reasonable time. They argue

that the bond which was filed was in substantial compliance with the statute, and that the court had jurisdiction of the appeal by virtue of the fact that the bond was signed by the surety and by Ruth B. Nieke, one of the defendants. Appeals in forcible entry and detainer are governed by statute. The appeal must be perfected "in the same manner and tried in the same way as appeals are taken and tried in other cases." (Sections 19 and 20, chapter 57, Ill. Rev. Stat. 1939.) The bond must provide that the defendant "will prosecute such appeal with effect, and pay all rent then due or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereto to plaintiff." The appeal was prayed by all of the defendants and the bond recites that all of the defendants are bound thereby. As stated, only one of the defendants signed the bond. Alfred Nieke and Minna Nieke did not sign the bond, and, therefore, did not effect or prosecute an appeal as provided by Section 20 of Chapter 57, (Forcible Entry and Detainer Act) Ill. Rev. Stat. 1939. The defendant declares that the appeal was not a joint appeal. We have carefully examined the reported cases and are convinced that it is not necessary that the parties appealing shall specifically state that the appeal is a joint appeal. If they all pray the appeal, it is a joint appeal. The reported cases also convince us that the defect in the bond is not a mere informality. One of the essentials in an appeal from a justice of the peace is that there be an appeal bond. Numerous cases hold that where a joint appeal is prayed and allowed, all appellants must sign the appeal bond, or the appeal on motion will be dismissed. Congregational Church of Harvard v. Page, 255 Ill. 267; Hilsman v. Beale, 115 Ill. 385; Tedrick v. Wells, 152 Ill. 214; Town v. Nowisson, 175 Ill. 85; Fortune v. Gilbert, 207 Ill. 235; Stiefel v. Amalgamated Sheet Metal Workers Local Union; 198 Ill. App. 94; National Bank of Commerce v. Church, 195 Ill. A pp. 310.

that the bond which was filed was the substantial equivalent with the statute, and that the court had jurisdiction of the appeal by virtue of the fact that the bond was signed by the party and by both S. Sidney, one of the defendants. Appellee is correct; only the defendants are prejudiced by statute. The appeal must be perfected "in the same manner and within the same very as appeals are taken and tried in other cases." (Sections 32 and 33, chapter 47, III. Rev. Stat. 1933.) The bond must provide that the defendant "will prosecute such appeal with effect, and pay all rent then due or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof is obtained". The appeal was proved by all of the defendants and the bond provides that all of the defendants are bound thereby. As stated, only one of the defendants signed the bond. Alfred Hicks and Edmon Hicks did not sign the bond, and, therefore, did not effect or prosecute an appeal as provided by section 30 of Chapter 57, (Forcible Entry and Detainer Act) III. Rev. Stat. 1933. The defendant declares that his appeal was not a joint appeal. We have carefully examined the reported cases and are convinced that it is not necessary that the pertinent appealing shall specifically state that the appeal is a joint appeal. If they all pray the appeal, it is a joint appeal. The reported cases also convince us that the defect in the bond is not a mere informality. One of the essentials in an appeal from a judgment of the justice in this State is an appeal bond. Therefore cases hold that where a joint appeal is prayed and filed, all appellants must also file appeal bond, or the appeal is action dismissed. Cumberland County v. Harvard v. Ferr, 208 Ill. 207; Hilliard v. Jones, 114 Ill. 444; Durham v. Wells, 126 Ill. 214; Tuck v. Dunlapson, 175 Ill. 24; Farrow v. Gilbert, 207 Ill. 204; Wilkes v. Independent Order Ancient Local Order, 158 Ill. App. 84; National Home of Deserter v. Sherb, 158 Ill. 4 App. 124.

Plaintiff also calls attention to the failure of the bond to provide for the payment of rent due or to become due. Because of our views on other points, it is unnecessary to decide whether the failure to provide for the payment of rent due or to become due was such a defect as could be amended.

Defendants further maintain that where any defendant is not made a party to an appeal bond, the court may, if it deems necessary, issue summons requiring the appearance of such defendant, and thereby obtain jurisdiction of him. They rely on Section 181 of Chapter 79, Ill. Rev. Stat. 1939, which reads: "When an appeal shall be taken by one of several parties from the judgment of a justice of the peace, the clerk of the court shall issue a summons against the other parties, notifying them of the appeal in the said court, and requiring them to appear and abide by and perform the judgment of the court in the premises. ***" This action is not applicable to the facts in the case at bar. It has reference to a situation where less than all of the defendants pray an appeal. In the instant case all of the defendants prayed an appeal. They also appeared in the County Court and urged that court to permit them to amend the appeal bond.

For the reasons stated, we are of the opinion that the County Court of Cook County was right in dismissing the appeal. Hence, the orders of the County Court of June 12, 1939, and July 1, 1939, are affirmed.

ORDERS AFFIRMED.

HEBEL, J, and
DENIS E. SULLIVAN, P.J., CONCUR.

Plaintiff also calls attention to the failure of the bond to provide for the payment of rent due or to become due. Because of our views on other points, it is unnecessary to decide whether the failure to provide for the payment of rent due or to become due was such a defect as would be remedied.

Defendants further maintain that where any defendant is not made a party to an appeal bond, the court may, if it deems necessary, issue summons requiring the appearance of such defendant, and thereby obtain jurisdiction of him. They rely on section 1821 of Chapter VI, Kil. Rev. Stat. 1899, which reads: "When an appeal shall be taken by one of several parties from the judgment of a justice of the peace, the clerk of the court shall issue a summons against the other parties, notifying them of the appeal in the said court, and requiring them to appear and abide by and perform the judgment of the court in the premises." This section is not applicable to the facts in the case at bar. It has reference to a situation where less than all of the defendants pray an appeal. In the instant case all of the defendants prayed an appeal. They also appeared in the County Court and urged that court to permit them to amend the appeal bond.

For the reasons stated, we are of the opinion that the County Court of Cook County was right in dismissing the appeal. Hence, the orders of the County Court of June 12, 1929, and July 1, 1929, are affirmed.

Order affirmed.

Mason, J., and
Matt L. Smallroy, Sub., dissenting.

41047

CHICAGO TITLE AND TRUST COMPANY,
a corporation, as Trustee,

Appellee,

v.

THOMAS D. RANDALL, EDITH A. RANDALL,
et al.,

Defendants.

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LOUIS SUSMAN,

Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, a
corporation, as Trustee, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

305 I.A. 497

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On May 3, 1927, Thomas D. Randall and Edith A. Randall, his wife, executed and delivered their 346 coupon bonds, numbered from 1 to 346 inclusive, for the aggregate principal sum of $[illegible].00. The bonds were in denominations of $500.00 and $1,000.00. Bonds numbered 1 to 8 matured May 3, 1929, and the balance matured successively thereafter on May 3rd and November 3rd until May 3, 1937. They bore interest at the rate of 6-1/2% per annum, payable semi-annually on the 3rd day of November and May of each year, evidenced by interest coupons attached thereto. To secure payment of the bonds, the Randalls, on the same day, executed and delivered their trust deed to the Chicago Title and Trust Company, as trustee, covering the real estate and improvements known as the Wayne Manor Apartments, located at 6838-50 Wayne Avenue, Chicago. This loan was for the purpose of constructing the building. In selling the bonds to the public, it was represented that the building would contain 60 apartments "completely furnished." At the time the bonds were sold the building was appraised at $[illegible],000.00, and the land at $30,000.00, a total security of $325,000.00. The trust deed provided that the borrower must deposit each month 1/6 of the semi-annual principal and interest throughout the term of the loan. The original underwriter of the bond issue

CHICAGO TITLE AND TRUST COMPANY,
a corporation, as Trustee,

Plaintiff,

v.

GEORGE E. ARGYRIS, ELIZA E. ARGYRIS,
et al.,

Defendants.

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LOUIS GERSTEN,

Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, a
corporation, as trustee, et al.,

Appellees.



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

ON MAY 2, 1927, Thomas G. Argyris and Edith A. Argyris, his wife, executed and delivered their 346 coupon bonds, numbered from 1 to 346 inclusive, for the aggregate principal sum of $300,000.00. The bonds were in denomination of $500.00 and $1,000.00. Bonds numbered 1 to 1 matured May 2, 1927, and the balance matured successively thereafter on the 2nd day of May and November for each year, the last being May 2, 1927. They bore interest at the rate of 8-1/2% per annum, payable semi-annually on the 2nd day of November and May of each year, evidenced by interest coupons attached thereto. To secure payment of the bonds, the Mandalin, on the same day, executed and delivered their trust deed to the Chicago Title and Trust Company, as trustee, covering the real estate and improvements known as the Payne Manor apartments, located at 4200-30 Payne avenue, Chicago. This loan was for the purpose of constructing the building. In selling the bonds to the public, it was represented that the building would contain 60 apartments "completely furnished." At the time the bonds were sold the building was appraised at $380,000.00, and the loan at $300,000.00, a total security of $680,000.00. The trust deed provided that the "property must insure more than 1/6 of the semi-annual principal and interest throughout the term of the loan. The original mortgagee of the bond issue

was Leight & Company. The principal and interest payments were to be made at the office of the latter company. Various defaults were made in the payment of principal, interest and taxes. A bondholders' committee was organized, which called upon the bondholders to deposit their bonds. On May 18, 1934, the trustee filed its complaint to foreclose the trust deed in the Circuit Court of Cook County. The cause was referred to a Master in Chancery, who reported his findings and recommendations. On February 21, 1936, a decree of foreclosure and sale was entered. Attached thereto was a copy of the original deposit agreement dated February 1, 1930, as amended April 4, 1930. This deposit agreement purported to be "for the protection of the bondholders or first mortgage bonds sold through Leight & Company". The preamble of the deposit agreement recited that it was the intention to take action to protect the various defaulted issues underwritten by Leight & Company. Section 1 of Article 1, thereof named the Chicago Title and Trust Company as depositary, and Section 2 of the same article provides that upon the determination of the committee, bonds of any given issue were to be called for deposit. A holder of any such bonds could deposit the same with the depositary and receive a certificate of deposit. Also attached to the statement of intention to bid, was a plan of reorganization. On May 10, 1938, the Master filed his report showing that he sold the premises to Elizabeth Henderson, as nominee of the committee, for the sum of $40,000.00. The Chancellor directed the committee to give notice by publication of the date set for the hearing of the motion to affirm the sale and the plan. On June 7, 1938, Louis Susman filed objections. On July 15, 1938, the court referred the petition for affirmation of the sale and for the approval of the plan, and the objections thereto, to a special commissioner. Susman also filed objections to the account of Harriet Henning, who had operated the property. He also filed a petition in the nature of a cross complaint. The court also referred the objections to the account of Harriet Henning to the special commissioner and also

was light & Company. The principal and interest payments were to be made at the office of the latter company. Various tabulations were made in the payment of principal, interest and taxes. A bondholders' committee was organized, which called upon the bondholders to deposit their bonds. On May 15, 1934, the trustee filed its complaint to foreclose the trust deed in the Circuit Court of Cook County. The cause was referred to a Master in Chancery, who received his findings and recommendations. On February 21, 1936, a decree of foreclosure and sale was entered. Attached thereto was a copy of the original deposit agreement dated February 1, 1930, as amended April 6, 1930. This deposit agreement purported to be "for the protection of the bondholders of first mortgage bonds said through Leight & Company". The preamble of the deposit agreement recited that it was the intention to take action to protect the various defaulted issues under-written by Leight & Company. Section 1 of Article I, thereof named the Chicago Title and Trust Company as depositary, and Section 2 of the same article provides that upon the determination of the committee, bonds of any given issue were to be called for deposit. A holder of any such bonds could deposit the same with the depositary and receive a certificate of deposit. Also attached to the statement of interest is the, see a plan of reorganization. On May 16, 1936, the Master filed his report showing that he said the premises to Elizabeth Henderson, as member of the committee, for the sum of $40,000.00. The Chancellor directed the committee to give notice by publication of the date set for the hearing of the motion to affirm the sale and the plan. On June 7, 1936, Louis Powers filed objections. On July 10, 1936, the court referred the petition for affirmation of the sale and for the approval of the plan, and the objections thereto, to a special commissioner. Powers also filed objections to the records of Harris Bowling, who had operated the property. He also filed a petition in the nature of a cross complaint. The court also referred the objections to the records of Harris Bowling to the special commissioner, who

directed the special commissioner to report to to whether Susman be granted leave to file the "petition in the nature of a cross-complaint". Susman was not an original purchaser of the bonds but purchased the same after the entry of the decree of foreclosure at prices ranging from 19 to 32 cents on the dollar. The special commissioner reported to the court. On the basis of the report the Chancellor entered an order on June 30, 1939, (1) confirming the sale, (2) directing certain changes in the plan of reorganization and approving the plan as so amended, (3) approving the report and account, and (4) denying leave of Susman to file the petition in the nature of a cross complaint. Susman filed application for an allowance of fees to his attorneys, which application, together with the application for fees filed by other counsel, was referred to the special commissioner. The special commissioner in a supplemental report recommended the allowance of fees to Susman's counsel. When the report came on for hearing before the Chancellor, he disallowed any fees to Susman's attorneys. Susman prosecutes this appeal from the decree confirming the sale and approving the plan of reorganization, from the refusal to allow his petition for affirmative relief, from the order approving the account, and from the order allowing fees to various parties and refusing to allow fees to his counsel.

The first criticism presented is that the decree, which placed certain defaulted bonds on a parity, was procured by fraud, and that it was the duty of the court to modify such decree. The bonds and coupons maturing up to and including May 3, 1929, numbers 1 to 5, in the aggregate principal sum of $3,000.00, were paid and canceled. The mortgagors failed to deposit funds for the payment of coupons Series 4 and bonds numbered 6 to 10, in the aggregate principal sum of $3,000.00, payable November 3, 1929. Leight & Company took up the matured bonds and coupons of this date from the bondholders thereof, and by notice served on the trustee dated January 27, 1930, purported to assert the right of Leight & Company under the trust deed, to hold

directed the special commissioner to report as to whether Dawson be granted leave to file the "petition in the nature of a cross-complaint". Dawson was not an original mortgagor of the bonds but purchased the same after the entry of the decree of foreclosure at prices varying from 10 to 25 cents on the dollar. The special commissioner reported to the court. On the basis of the report the Chancellor entered an order on June 30, 1922, (1) confirming the sale, (2) directing certain changes in the plan of reorganization and approving the plan as so amended, (3) approving the report and accounts, and (4) denying leave of Dawson to file the petition in the nature of a cross complaint. Dawson filed application for an allowance of fees to his attorneys, which application, together with the application for fees filed by other counsel, was referred to the special commissioner. The special commissioner in a supplemental report recommended the allowance of fees to Dawson's counsel. Upon the report came on for hearing before the Chancellor, he disallowed any fees to Dawson's attorneys. Dawson prosecutes this appeal from the decree confirming the sale and approving the plan of reorganization, from the refusal to allow his petition for cross-complaint filed, from the order approving the accounts, and from the order allowing fees to various petitioners and refusing to allow fees to his counsel.

The first criticism presented is that the decree, which placed certain defaulted bonds on a parity, was procured by fraud, and that it was the duty of the court to modify such decree. The bonds and coupons maturing up to and including May 2, 1920, numbers 1 to 8, in the aggregate principal sum of $2,000.00, were paid and cancelled. The mortgagors failed to deposit funds for the payment of coupons bearing 4 and bonds numbered 9 to 10, in the aggregate principal sum of $2,000.00, payable November 2, 1920. Lehigh & Susquehanna took up the defaulted bonds and coupons at this date from the bondholders thereof, and by mutual agreement on the transfer date January 10, 1920, interested in assets the right of Lehigh & Susquehanna under the trust deed, to which

such bonds and coupons so purchased by it on a parity with the unmatured bonds and coupons. It failed, however, to give such notice to the bondholders. The trust deed provides that in the event Leight & Company advanced any of its funds on principal or interest, then on failure to notify the trustee and the bondholders, the bonds or coupons so acquired should be treated as subrogated. In November or December, 1929, certain bondholders and representatives of Leight & Company held meetings to determine what action should be taken in view of the default in meeting the November 2, 1929, principal and interest maturities. Homer A. Tinsman, a Chicago attorney, attended the meetings. He had purchased a number of bonds of the Wayne Manor Apartments issue in behalf of his clients. As a result of the meetings, Tinsman agreed (a) to take over the title to the property, and (b) to cure the existing defaults under the first mortgage bond issue, and thereafter to keep the bonds in good standing. At the time Tinsman agreed so to do, there was also a second mortgage on the property, securing an indebtedness of Thomas Randall and wife for $11,500.00, chattel mortgage notes held by Homer Bros. for the balance of the purchase of furniture installed in the property, an unpaid obligation of $1,350.00 for carpets purchased from Niebolt's, and an unpaid charge of $900.00 for a stoker. It appears that Norman Randall, a brother of Thomas Randall, who had no interest in the title to the land and building, had joined Thomas Randall in the execution of the chattel mortgage notes for the furniture. In connection with the transfer of title, Tinsman executed an instrument to indemnify Thomas Randall and his wife and Norman Randall and his wife on account of all of said obligations, except the second mortgage. Tinsman, however, agreed to pay up to $5,000.00 to acquire the second mortgage notes. Immediately upon the conveyance of the title to him, Tinsman made a conveyance thereof to his wife, Christine W. Tinsman, who thereafter held title. Leight & Company suspended business on February 17, 1930, when a petition in bankruptcy was filed against it in the United States District Court for the Northern

much funds and company so purchased by it on a parity with the unsecured bonds and company. It failed, however, to give such notice to the bondholders. The trust deed provides that in the event Light & Company advances any of its funds on principal or interest, then on failure to notify the trustee and the bondholders, the bonds or coupons so received should be treated as subrogated. In November or December, 1929, certain bondholders and representatives of Light & Company had meetings to determine what action should be taken in view of the default in meeting the November 3, 1929, principal and interest maturities. Lester R. Tiemann, a Chicago attorney, attended the meetings. He had procured a number of bonds of the same issue. Instructions issue in behalf of his clients. As a result of the meetings, Tiemann agreed (a) to take over the title to the property, and (b) to cure the existing default under the first mortgage bond issue, and thereafter to keep the bonds in good standing. At the time Tiemann agreed so to do, there was also a second mortgage on the property, securing an indebtedness of Thomas Rundell and wife for $11,500.00, current mortgage notes held by Homer Ives, for the balance of the purchase of furniture installed in the property, an unpaid policy item of $1,700.00 for carpets purchased from Reinhart's, and an unpaid storge of $300.00 for a stoker. It appears that Thomas Rundell, a brother of Thomas Rundell, who had no interest in the title to the land and building, had joined Thomas Rundell in the execution of the second mortgage notes for the furniture. In connection with the transfer of title, Tiemann executed an instrument to indemnify Thomas Rundell and his wife and Thomas Rundell and his wife on account of all of said obligations, except the second mortgage. Tiemann, however, agreed to pay up to $1,000.00 to retire the second mortgage notes. Immediately upon the conveyance of the title to him, Tiemann made a conveyance thereof to his wife, Christine H. Tiemann, who thereafter held title. Light & Company completed business on January 17, 1930, when a petition in bankruptcy was filed against it in the United States District Court for the Northern

District of Illinois. Possession of the property was taken over by the new owner on or before February 1, 1930. Upon so doing, the Tinsmans paid Leight & Company the sum of $7,071.18, being payment of all the bonds and coupons theretofore taken up by Leight & Company. As a result of this payment, all bonds and coupons due and unpaid up to and including November 3, 1929, were retired and canceled. The general protective committee for the bondholders of bonds underwritten by Leight & Company was formed on the eve of its bankruptcy. Prior to the transfer of the title to the Tinsmans, the Randalls had turned over to the general bondholders group, which was negotiating with Tinsman, certain accumulated income from the property in the amount of $3,085.50. After the Tinsmans took over the premises, this general bondholders committee turned over the said accumulated income in the amount of $3,085.50, to the Tinsmans. At that time the bonds on the Wayne Manor Apartments had not been called for deposit. Appellees maintain that the money so turned over constituted a partial offset to the amount advanced by the Tinsmans to place the issue in good standing. Christine D. Tinsman operated the property from February 1, 1930, to July 14, 1933, at which time a tax receiver, appointed by the County Court, took over the operation of the building. The Tinsmans did not pay the monthly deposits called for by the trust deed. Bonds 16 and 17 came due on May 3, 1930, at which time Christine D. Tinsman held the record title. Appellant insists that Tinsman acquired bonds numbered 11 to 38 after maturity, that they were not canceled, and that they should be considered canceled. He (appellant) argues that a fraud was committed on the court in permitting Tinsman to prove up these bonds on a parity with the other bonds. He declares that if the trustee and the committee were diligent in their efforts they would have discovered that the testimony of Tinsman was false, as was later disclosed by his own books and records. Appellees answer that Christine D. Tinsman paid the semi-annual installments of interest beginning May 3, 1930, up to and including November 3, 1932;

district of Illinois. Receivers of the property are taken over by the new owner on or before February 1, 1890. Upon so doing, the Tiberius paid Leight & Company the sum of $7,871.18, being payment of all the bonds and coupons theretofore taken up by Leight & Company. As a result of this payment, all bonds and coupons due and unpaid up to and including November 1, 1889, were retired and cancelled. The general protective committee for the bondholders of bonds written by Leight & Company was formed on the eve of its bankruptcy. Prior to the transfer of the title to the Tiberius, the trustee had turned over to the general bondholders group, which was negotiating with Tiberius, certain accumulated income from the property in the amount of $5,000.00. After the Tiberius took over the premises, this general bondholders committee turned over the well accumulated income in the amount of $5,000.00, to the Tiberius. At that time the bonds on the new issue instruments had not been called for payment. Appellees maintain that the money so turned over constitutes a partial offset to the amount advanced by the Tiberius to place the issue in good standing. Christine E. Tiberius executed the property from February 1, 1890, to July 14, 1892, at which time a tax receiver, appointed by the County Court, took over the execution of the building. The Tiberius did not pay the monthly deposits called for by the trust deed. Bonds 16 and 17 came due on May 2, 1890, at which time Christine E. Tiberius held the record title. Appellant insists that Tiberius acquired bonds amounted to 38 after maturity, that they were not cancelled, and that they should be considered cancelled. In (appellees) argues that a fund was accumulated on the money in paying Tiberius to prove up these bonds on a parity with the other bonds. He declares that if the trustee and the committee were diligent in their efforts they would have discovered that the testimony of Tiberius was false, as was later disclosed by his own books and records. Appellees answer that Christine E. Tiberius paid the semi-annual installments of interest beginning May 2, 1890, up to and including November 2, 1892;

that during this period Homer A. Tinsman arranged for various persons to take up bonds numbered 11 to 38 when they became due, from the original owners thereof; that although the actual payments to the original holders of the bonds, in some instances, were made subsequent to the maturity dates of the bonds, the transfer thereof had been negotiated prior to the respective maturity dates. We have examined the record and noted the testimony of Mr. Tinsman in the original foreclosure case, and also the testimony introduced before the special commissioner, and find that no fraud was perpetrated on the court in proving up bonds numbered 11 to 38 on an equality with the other bonds. The record supports the finding of the Chancellor in the original decree and in the supplemental decree that the disputed bonds were, in fact, purchased for clients of Mr. Tinsman, and that they were purchased on or prior to maturity.

Appellant also maintains that the committee and trustee were guilty of misrepresentation and gross negligence, and are liable for the damage caused to the investors whom they pretended to protect. Under this point he states that the bondholders were kept in the dark as to the defaults, and as to the fact that Leight & Company held the defaulted bonds on a parity; that the committee manipulated so that the defaulted bonds and coupons in excess of $10,000.00 of Leight & Company were paid; that $3,000.00 of the income in possession of the committee was used to pay Leight & Company on its defaulted bonds; that this $3,000.00 was lost to the bondholders; that the committee worked out a deal by which Tinsman was to maintain the future payments, but that the committee allowed him to manage the property and not to pay a single cent on account of taxes from 1930 to 1934, ultimately resulting in the appointment of a tax receiver; that the committee stood by and permitted Tinsman to take up bonds numbered 11 to 38 uncanceled without informing the investors of such fact; that contrary to the provision of the trust indenture, the committee did not require Tinsman to make monthly deposits; that

that during this period Homer E. Tinsman arranged for various persons to take up bonds numbered 11 to 38 when they became due, from the original owners thereof; that although the actual payments to the original holders of the bonds, in some instances, were made subsequent to the maturity dates of the bonds, the transfer thereof had been arranged prior to the respective maturity dates. We have examined the record and noted the testimony of Mr. Tinsman in the original foreclosure case, and also the testimony introduced before the special commissioner, and find that no fraud was perpetrated on the court in paying up bonds numbered 11 to 38 on an equality with the other bonds. The record supports the finding of the chancellor in the original decree and in the supplemental decree that the disputed bonds were, in fact, purchased for clients of Mr. Tinsman, and that they were purchased on or prior to maturity.

Appellant also maintains that the receiver was guilty of misrepresentation and gross negligence, and are liable for the damage caused to the investors when they proceeded to protest. Under this point he states that the bondholders were kept in the dark as to the defaults, and as to the fact that Knight & Company held the defaulted bonds on a parity; that the committee manipulated so that the defaulted bonds and coupons in excess of $10,000.00 of Knight & Company were paid; that $3,000.00 of the income in possession of the committee was used to pay Knight & Company on its defaulted bonds; that this $3,000.00 was lost to the bondholders; that the committee worked out a deal by which Tinsman was to maintain the Tabor property, but that the committee failed its to manage the property and not to pay a single cent on account of taxes from 1920 to 1924, ultimately resulting in the appointment of a tax receiver; that the committee stood by and permitted Tinsman to take up bonds numbered 11 to 38 unannounced without informing the investors of such fact; that contrary to the prevision of the trust instrument, the committee did not require Tinsman to make monthly deposits; that

they permitted Tinsman to prove up the parity of bonds numbered 11 to 38 and the priority of the interest coupons on these bonds; that they permitted defaults in the nonpayment of interest since November 3, 1929, to the date the complaint was filed, and that because of the gross negligence of the committee, the bondholders suffered the following loss: 1. Payment of $3,000.00 in 1930, from income, to Leight & Company; 2. Defaults in 1929 taxes - $4,510.96, 1930 taxes - $5,010.74, 1931 taxes - $2,255.65, 1932 taxes - $3,500.00, a total of $15,277.33; 3. Placing bonds 11 to 38 on parity aggregating $18,000.00; 4. Placing interest on bonds 11 to 38 for November 3, 1932, in the amount of $4,610.75, superior to all bonds; 5. Placing interest coupons 7 to 11 superior to the bonds of the investors, aggregating $1,534.00; 6. Failure to take action to collect the debt from the makers and entered into a deal to release them; 7. Allotment of 7-1/2% to the owner and $2,000.00 to the junior mortgagee. In connection with this point appellant states that "for the gross negligence of the committee the court allowed it and its agencies $6,000.00 as a reward! A negligent trustee is not entitled to rewards." Sussman states that on January 27, 1930, the trustee, by receipt of a notice from the house of issue, knew that the mortgagors had defaulted, and that the house of issue was claiming that the bonds on which default had been made were being attempted to be placed on a parity; that the trustee knew that under the trust indenture, notice should be served on the bondholders, and that neither the trustee nor the committee should have permitted the defaults to exist up to the filing of the complaint in 1934, and that the members of the committee and the trustee are liable for their gross negligence. Appellees point out that as the bonds and coupons which matured November 3, 1929, the record shows that all of these were paid and canceled by the Tinsmans when they took over the premises in February, 1930. At the time the Tinsmans took over the property, no other interest or principal was due under the bond issue, the next maturity being May 3, 1930. At that time no taxes were delinquent.

they permitted Timmons to prove up the parity of bonds mortgaged if to
it and the priority of the interest coupons on their bonds; that they
permitted defaults in the payment of interest since November 2, 1920,
to the date the complaint was filed, and that because of the gross
negligence of the committee, the bondholders suffered the following
loss: 1. Payment of $2,000.00 in 1920, from income, to lighten a
company; 2. Default in 1921 taxes - $4,610.56, 1920 taxes - $2,222.74,
1921 taxes - $2,252.62, 1922 taxes - $2,300.00, a total of $12,377.92;
3. Finding bonds if to 38 on parity aggregating $2,000.00; 4.
Placing interest on bonds if to 38 for November 2, 1922, in the amount
of $4,210.75, superior to all bonds; 5. Placing interest coupons 7 to
12 superior to the bonds of the investors, aggregating $1,684.00; 6.
Failure to take action to enforce the note from the mortgagor and entered
into a deal to release them; 7. Allotment of 7-1/2% to the owner and
$2,000.00 to the junior mortgagee. In connection with this point
counsel states that "for the gross negligence of the committee the
court allowed it and its agencies $4,000.00 as a reward! A negligent
trustee is not entitled to rewards." Bowman states that on January 27,
1920, the trustee, by receipt of a notice from the house of issue, knew
that the mortgagors had defaulted, and that the house of issue was
claiming that the bonds on which interest had been made were being
attacked in an effort on a parity; that the trustee knew that under
the trust indenture, notice should be served on the bondholders, and
that neither the trustee nor the committee should have permitted the
defaults to exist as in the filing of the complaint in 1924, and that
the members of the committee and the trustee are liable for their gross
negligence. Appellees point out that as the bonds and coupons which
matured November 1, 1920, the record shows that all of these were paid
and remained by the Timmons when they took over the premises in
February, 1920. At the time the Timmons took over the property, no
other interest or principal was due under the bond issue, the next
maturity being May 2, 1920. At that time no taxes were delinquent.

The 1927 and prior years' taxes were paid. The 1928 taxes, as a result of the reassessment ordered by the State Tax Commission, were not due and, in fact, did not become delinquent until July 10, 1930. The 1929 taxes did not become delinquent until May 15, 1931. The record shows that following the general default in the payment of interest on May 3, 1932, the committee called the bonds for deposit. As soon as the committee had obtained a deposit of in excess of 20% of the bond issue, it acted pursuant to the terms of the trust deed, to declare the entire issue due and payable, and called on the trustee to institute foreclosure proceedings. Prior to that time no request had been made on the trustee to file a foreclosure. Under the provisions of the trust indenture, the trustee was not required to foreclose, except upon the request of the holders of 20% or more in principal amount of outstanding bonds. Christine S. Tinsman paid semi-annual installments of interest beginning May 3, 1930, to and including November 3, 1932, aggregating $36,968.50. During the period when Mrs. Tinsman operated the property, (from February 1, 1930, to July 14, 1932) in addition to the payments of interest aggregating $36,968.50, the Tinsmans made disbursements as follows: $1,748.50 to Kieboldts in payment of carpeting; $4,251.50 to Homer Bros. in payment of the chattel mortgage notes; $7,547.48 to holder of junior mortgage, and in excess of $900.00 on stoker payments. During this period all of the income was accounted for by the Tinsmans and applied in connection with the property. In addition, the Tinsmans supplemented the income from the property with their own funds to the extent of over $30,000.00. It was the additional contributions made by the Tinsmans that made possible the payments of interest from 1930 to 1932, and the other disbursements, which were of benefit to the bondholders. The special commissioner found that eliminating the payments to Leight & Company and to the holder of the junior mortgage, there was a cash contribution by the Tinsmans of $9,845.17 for the benefit of the bondholders. The accumulated income in the amount of $3,085.50 in the hands of the

The 1927 and prior years' taxes were paid. The 1928 taxes, as a result of the reassessment ordered by the State Tax Commission, were not due and, in fact, did not become delinquent until July 10, 1929. The 1929 taxes did not become delinquent until May 10, 1931. The record shows that following the general default in the payment of interest on May 2, 1932, the committee called the bonds for deposit. As soon as the committee had obtained a deposit of in excess of 50% of the bond issue, it acted pursuant to the terms of the trust deed, to declare the entire issue due and payable, and called on the trustee to institute foreclosure proceedings. Prior to that time no request had been made on the trustee to file a foreclosure. Under the provisions of the trust indenture, the trustee was not required to foreclose, except upon the request of the holders of 50% or more in principal amount of outstanding bonds. Effective 9, Timmons paid semi-annual installments of interest beginning May 2, 1930, to and including November 2, 1932, aggregating $4,888.80. During the period when the Timmons operated the property, from February 1, 1930, to July 14, 1931, in addition to the payments of interest aggregating $4,888.80, the Timmons made disbursements as follows: $1,748.50 to Wisbolds in payment of expenses; $4,881.30 to Homer Ross. In payment of the chattel mortgage notes; $7,547.48 to holder of junior mortgage, and in excess of $800.00 on stolen payments. During this period all of the income was accounted for by the Timmons and applied in connection with the property. In addition, the Timmons supplemented the income from the property with their own funds to the extent of over $20,000.00. It was the additional contributions made by the Timmons that made possible the payments of interest from 1930 to 1932, and the other disbursements, which were of benefit to the bondholders. The special commissioner found that eliminating the payments to Lehigh & Company and to the holder of the junior mortgage, there was a net contribution by the Timmons of $2,840.17 for the benefit of the bondholders. The accumulated income in the amount of $3,088.20 in the hands of the

general bondholders committee, was the money of the Randalls as owners of the property. As the Randalls made such income available to the general bondholders committee, the latter body had a right to turn it over to Mr. Finsman at the time he took over the property. At that time no defaults existed under the bond issue. The special commissioner found that the payment to Leight & Company for the defaulted bonds and coupons was made out of the personal funds contributed by the Finsmans and not out of the income from the property. We are of the opinion that in all of these findings, the special commissioner was right. As to the claimed loss to the bondholders in the nonpayment of taxes, the record shows that the property was operated by tax receivers of the County Court and the Circuit Court from July 1, 1933, to February 1, 1936. On February 1, 1936, an order was entered in the tax receivership proceedings dismissing the tax receiver and placing Christine D. Finsman in possession upon the condition that all income from the property be applied on taxes. She entered into possession and operated the property pursuant to the order from February 1, 1936, to April 30, 1937. Her husband, Homer S. Finsman, acted as her agent from February 1, 1936, to the date of his death, March 11, 1937. Pursuant to the court order, all income during the period of operation was applied on account of taxes. Mr. Finsman received no compensation for his services, although payments of $30.00 a month up to a total of $660.00 were deducted for rental of furniture. As soon as the plan of reorganization was agreed upon, Christine D. Finsman deeded the property to Harriet Henning, as nominee of the committee, for the purposes of the plan, and immediately thereafter the committee caused an order to be entered in the foreclosure proceedings, permitting Harriet Henning to retain possession of the property under bond in lieu of receivership, and directed the said Harriet Henning to apply all the income toward the payment of taxes. The committee employed Herman L. Randall to supervise the operation of the premises on behalf of Harriet Henning, upon a

general bondholders committee, was the agent of the trustee in order of the property. In the trustee made such issues available to the general bondholders committee, the latter only had a right to turn it over to Mr. Hinman at the time he took over the property. It that time no bondholder related under the bond issue. The general commissioner found that the payment to bright & company for the defaulted bonds and coupons was made out of the personal funds contributed by the Hinmans and not out of the income from the property. As are of the opinion that in all of these findings, the general commissioner was right. As to the claimed loss to the bondholders in the management of trust, the record shows that the property was operated by the receivers of the County Court and the Circuit Court from July 1, 1933, to February 1, 1934. On February 1, 1934, an order was entered in the Circuit Court providing discharging the receivers and closing Greenlee 6. Thereon in consideration upon the condition that all income from the property be applied in trust, the entered into receivership and operated the property under the order from February 1, 1934, to April 30, 1937. For business, Hinman, G. Hinman, noted on her court from February 1, 1934, to the date of his death, March 12, 1937. Pursuant to the court order, all income during the period of operation was applied on account of trust. Mr. Hinman received no compensation for his services, although payments of $30.00 a month up to a total of $900.00 were deducted for rental of furniture. As soon as the plan of reorganization was agreed upon, Mr. Hinman G. Hinman asked the property be placed in trust, at request of the committee, for the purpose of the plan, and immediately thereafter the committee passed an order to be entered in the Circuit Court of Greenlee, permitting Hinman Trustee to write promissory of the security under bond in lieu of mortgaging, and directed the said trustee issuing to apply all the income toward the payment of taxes. The committee explained further, it should be apparent the operation of the property as until at higher income, some a

compensation of 5% of the gross income. The record shows that all of the income was accounted for and used for the benefit of the property and the first mortgage bondholders, and that the trustees contributed large sums out of their personal funds. The trustee and the members of the bondholders committee were obliged to exercise a sound and honest discretion in calling the bonds for deposit and instituting the foreclosure proceeding. We are unable to agree with the contention of appellant that the members of the committee and the trustee, or either, were guilty of misrepresenting the situation to the bondholders, or of any negligence. It does not appear that the bondholders suffered any harm by the delay in filing the complaint in foreclosure. The mortgagors (the Randalls) were not released from liability. A deficiency judgment was entered against them. After a careful perusal of the record, we conclude that the contention of Hansen that the trustee and the bondholders committee were guilty of negligence and misrepresentation which caused damage to the bondholders, has not been sustained.

Appellant further argues that it was the duty of the court to disapprove the sale, to fix an upset price, and to direct the trustee to bid under the powers vested in it by the trust indenture. The plan presented to the Chancellor contemplated the creation of a corporation which was to acquire the property, and the issuance of common stock to the bondholders in place of their bonds. 87-1/2% of the stock was to go to the bondholders and 12-1/2% to the owner of the equity. The corporation was to pay $2,000.00 to discharge a $5,400.00 junior lien, and to assume all costs of foreclosure, reorganization fees, expenses and unpaid taxes. The stock was to be held in a voting trust for a period of 5 years. The plan was modified to the extent of (1) reducing the owner's allotment from 12-1/2% to 7-1/2%; (2) the appointment by the court, in lieu of the committee, of two of the three trustees; (3) shortening the duration of the trust

consumption of $4.4 of the gross income. The record shows that all of the income was accounted for and used for the benefit of the property and the first mortgage bondholders, and that the [illegible] contributed large sums out of their personal funds. The trustees and the owners of the bondholders committee were obliged to exercise a sound and honest discretion in calling the bonds for arrears and instituting the foreclosure proceeding. It is not unlike to agree with the contention of appellant that the members of the committee and the trustees, as plaintiff, were guilty of misrepresenting the situation to the bondholders, or of any negligence. It does not appear that the bondholders suffered any harm by the delay in filing the complaint in foreclosure. The mortgagors (the Dwellis) were not released from liability. A deficiency judgment was entered against them. After a careful perusal of the record, we conclude that the contention of appellant that the trustees and the bondholders committee were guilty of negligence and misrepresentation with respect thereto to the bondholders, has not been sustained.

Appellant further argues that it was the duty of the court to disregard the sale, to fix an upset price, and to direct the trustee to bid under the powers vested in it by the trust instrument. The plan presented to the Chancellor contemplated the creation of a corporation which was to acquire the property, and the issuance of common stock to the bondholders in place of their bonds. $17-1/2% of the stock was to go to the bondholders and 12-1/2% to the owner of the equity. The corporation was to pay $5,000.00 to discharge a $5,000.00 junior lien, and to assume all costs of foreclosure, reorganization fees, expenses and unpaid taxes. The stock was to be held in a voting trust for a period of 5 years. The plan was modified to the extent of (1) reducing the owner's allotment from 12-1/2% to 7-1/2%; (2) the appointment by the court, in lieu of the committee, of two of the three trustees; (3) authorizing the duration of the trust

from five to three years, and (4) reduction of the fees of the committee and its agencies. With these modifications, the court approved the sale and the plan on June 30, 1938, and reserved ruling on the objections to the commissioner's recommendations to pay fees to appellant's counsel. In the cases of Levy v. Broadway-Screen Building Corp., 366 Ill. 279, and First National Bank v. Bryn Mawr Beach Bldg. Corp., 365 Ill. 409, our Supreme Court recognized the right of a court of chancery to fix an upset price in mortgage foreclosure sales. While the trust indenture provided that the trustee might bid at any sale, such instrument did not require the trustee to bid. Appellant argues that it was the duty of the chancellor to fix an upset price and direct the trustee to bid. Paraphrasing the language of the Bryn Mawr Beach case, we are of the opinion that under the provisions of the trust deed and the circumstances of this case, the chancellor did not err in refusing to require the trustee to bid, and that there was no negligence or failure of duty on the trustee's part in failing to bid.

Appellant also asserts that the plan and sale were both unfair. There is no challenge to appellant's statement that in order to approve a sale coupled with a plan, there must be two requisites, namely, a fair plan and a fair sale. He argues that both the plan and the sale were unfair. He charges that the original plan tended to deprive the bondholders of 15% of their security, and that the amended plan deprives them of 10% of their security. Due to the objection of appellant, the common stock allotted to the equity owner was reduced from 13-1/2% to 7-1/3%. The junior mortgagee was paid $1,000.00, or 37% of the face amount of the mortgage. He calls our attention to the case of Case v. Los Angeles Lumber Co., 308 U. S. 106, (the reorganization of a corporation under Section 77B of the Bankruptcy Act), which holds that the stockholders of an insolvent corporation in which the stockholders have no equity remaining, may not participate

from five to three years, and (4) reduction of the face of the securities and its equities. With these modifications, the court approved the sale and the plan on June 20, 1939, and overruled ruling on the objections to the constituent's recommendation to pay free to appellant's counsel. In the cases of Petty v. Bituminous-Coaxial Building Corp., 100 Ill. App. 474, and Lake Erie Corp. v. Pure Oil Co., 300 Ill. App. 474, our Appellate Court overruled the plea of a court of chancery in fix an equal price in certain foreclosure sales, while the trust indenture provided that the trustee might bid at any sale, such instrument did not require the trustee to bid. Appellees argue that it was the duty of the committee to fix an equal price and direct the trustee to bid. Interpreting the language of the Lake Erie case, we are of the opinion that under the provisions of the trust deed and the agreement-terms of this case, the committee did not err in refusing to require the trustee to bid, and that there was no negligence or failure of duty on the trustee's part in failing to bid.

Appellant also asserts that the plan and sale were both unfair. There is no challenge to appellant's statement that in order to approve a sale coupled with a plan, there must be two requisites, namely, a fair plan and a fair sale. He argues that both the plan and the sale were unfair. He argues that the original plan tended to deprive the bondholders of 15% of their security, and that the amended plan deprives them of 10% of their security. Due to the objection of appellant, the common stock allotted to the equity owner was reduced from 15-1/3% to 7-1/3%. The junior mortgagee was paid [illegible] or 37% of the face amount of the mortgage. We call our attention to the case of Dunn v. Lee Theater Number Two, 308 N. Y. 104, (the reorganization of a corporation under Section 77B of the Bankruptcy Act), which holds that the stockholders of an insolvent corporation in which the stockholders have no equity remaining, may not participate

in a plan of reorganization unless a fresh contribution is made by such stockholders to the corporate assets. In Chicago Title and Trust Co. v. Bartell, 297 Ill. App. 649, (abstract opinion) this court said:

> "It is a matter of common knowledge that business men regard such intervening rights as having considerable value and the payment of considerable sums to get them out of the way is not unusual."

Our view is that the holding in Bass v. Los Angeles Lumber Co., supra., does not affect what was said in Chicago Title and Trust Co. v. Bartell. In this state the mortgagors, the title holders and the junior mortgagees have redemption rights, and therefore, they have something to contribute in working out the plan. It is common knowledge that a bondholders committee may be unable to proceed with a plan of reorganization unless they have disposed of the right to redeem. As to whether the sale was fair, the property was bid in by the nominee of the committee for $40,000.00. Under the opinion in the Bryn Mawr Beach case, it is necessary to add the amount of all unpaid taxes to the amount of the sale bid to ascertain the price being paid for the property. The sale bid of $40,000.00, plus taxes, makes the total cost of the property to the depositing bondholders approximately $65,1[illegible].13. A consideration of the record satisfies us that the Chancellor was right in confirming the sale.

Appellant further contends that the court was in error in refusing to force the return of the 5% commission which was paid to Norman Randall for management. The court authorized the owner to remain in possession under a bond. Appellant contends that the statute which authorizes the court to permit the owner to remain in possession under bond, does not authorize the owner to charge for management. The owner was a nominee of the bondholders committee. Although the statute does not say anything about compensation, under its general equity powers the court had a right to allow management fees to the agent appointed by her. We are unable to say that in so deciding the Chancellor abused his discretion. We have also considered the point that the fees allowed to the depositaries and to the committee were excessive. We cannot sustain this contention.

in a plan of reorganization unless a fresh contribution is made by such stockholders to the corporate assets. In Chicago Title and Trust Co. v. Kostell, 327 Ill. App. 648, (abstract opinion) this court said:

> "It is a matter of common knowledge that bondholders and holders of participating rights or having subordinate rights and the payment of bondholders seem to get them out of the mud in but one manner."

Our view in this the ruling in Chicago v. Lee Junior College, supra., does not affect what was said in Chicago Title and Trust Co. v. Kostell. In this state the mortgagee, the title holders and the junior mortgagees have redemption rights, and therefore, they have something to contribute in working out the plan. It is common knowledge that a bondholders committee may be unable to proceed with a plan of reorganization unless they have disposed of the right to redeem. In whether the sale was fair, the property was bid in by the members of the committee for $40,000.00. Under the ruling in the Chicago case, it is necessary to add the amount of all unpaid taxes to the amount of the sale bid to ascertain the price being paid for the property. The sale bid of $40,000.00, plus taxes, makes the total cost of the property to the depositing bondholders approximately $48,150.15. A consideration of the record satisfies us that the Chancellor was right in sustaining the sale.

Appellant further contends that the court was in error in refusing to force the return of the $5 commission which was paid to Herman Nudell for management. The court authorized the owner to remain in possession under a bond. Appellant contends that the statute which authorizes the court to permit the owner to remain in possession under bond, does not authorize the owner to charge for management. The owner was a member of the bondholders committee. Although the statute does not say anything about compensation, under its general equity powers the court had a right to allow management fees to the agent appointed by her. We are unable to say that in so doing the Chancellor abused his discretion. We have also considered the point that the fees allowed to the depositaries and to the committee were

Finally, appellant urges that the denial of fees for services rendered by his attorney, was unwarranted. The special commissioner, who was thoroughly familiar with the extent and value of the services rendered by counsel for the appellant, recommended that they be allowed the sum of $1,250.00. Appellees point out that all of the modifications in the plan as adopted by the court, were not induced by the efforts of counsel for appellant. That statement is correct. Nevertheless, the efforts of counsel did result in benefit to the bondholders in that the share of the owner in the stock of the new corporation was reduced from 13-1/3% to 7-1/2%; the depository fees were reduced from $5,280.00 to $1,579.00 and the committee's fees from $3,187.00 to $2,015.00; the term of the voting trust was shortened from five to three years, and the protective committee was deprived of the privilege of naming the majority of the trustees. In First National Bank v. LaSalle-Wacker Bldg. Corp., 280 Ill. App. 189, we affirmed an allowance to attorneys for bondholders who appeared and procured changes in the plan. As the estate was benefited by the services rendered by counsel for appellant, we are of the opinion that he should be allowed reasonable fees to compensate them. Having carefully considered the facts and circumstances presented by the record, we find that $500.00 is a reasonable fee for the services rendered by counsel for appellant.

For the reasons stated, all the orders and decrees appealed from are affirmed, except the order entered September 11, 1939, which is hereby amended by allowing the sum of $500.00 to Louis Guzann, appellant, for the services rendered by his attorneys. So amended, the decrees and orders of the Circuit Court of Cook County are affirmed.

DECREES AND ORDERS AFFIRMED,
AS AMENDED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

Finally, counsel urges that the denial of fees for services rendered by his attorney, was unconstitutional. The trial commissioner, who was thoroughly familiar with the nature and value of the services rendered by counsel for the bankrupt, recommended that they be allowed the sum of $1,750.00. Similarly, point out that all of the modifications in the plan as entered by the court, were not induced by the efforts of counsel for creditors. That statement is correct. Nevertheless, the efforts of counsel for creditor in bringing to her knowledge the fact that the owner in the chain of the new corporation was reduced from 12-1/2% to 7-1/2%; the depository fees were reduced from $4,000.00 to $1,875.00 and the committee's fees from $2,187.50 to $2,625.00; the term of the voting trust was shortened from five to three years, and the restrictive conditions were lessened at the principle of making the majority of the investors. In First National Bank v. Lafayette-Monroe Bldg. Corp., 280 Ill. App. 182, we affirmed an allowance to attorneys for bondholders who appeared and presented changes in the plan. As the courts are benefited by the services rendered by counsel for appellant, we are of the opinion that he should be allowed reasonable fees to compensate them. Having carefully considered the facts and circumstances presented by the record, we find that $500.00 is a reasonable fee for the services rendered by counsel for appellant.

For the reasons stated, all the orders and decrees appealed from are affirmed, except the order entered September 11, 1951, which is hereby reversed by allowing the sum of $500.00 to Louis Hanson, appellant, for the services rendered by his attorney. So ordered.

The decree and orders of the Circuit Court of Cook County are affirmed.

DECREES AND ORDERS AFFIRMED.
IN PART.

PARTS 2, REVERSED, 3.4. AND ORDER, 1. REMOVED.

41120

CHARLES M. VITO and WILLIAM H. KATT,
(Plaintiffs) Appellees,
v.
STANDARD INSURANCE COMPANY OF NEW YORK,
(Defendant) Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

305 I.A. 497

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

For some time prior to October, 1938, plaintiffs owned and operated a tavern and night club at 2934-36 West Madison Street, Chicago, under the name of the "Club Rendevous". On the first floor there was a bar and a restaurant. The second floor consisted of two six room flats, separated by a solid partition. The flat over No. 2934 was occupied by plaintiff William H. Katt, an attorney-at-law. He occupied that flat as his home and a part time law office. That flat was also used for keeping the supplies and as an office for the tavern and cabaret business. The record is confusing as to the occupancy of the flat above No. 2936. On October 28, 1938, in consideration of the sum of $635, plaintiffs made and delivered a chattel mortgage covering all of the personal property in the premises, to the First United Finance Corporation. The indebtedness was to be repaid in successive installments of $15.00 per week. The mortgage loan was made by the issuance by the finance company of three checks payable to plaintiffs. One of the checks in the sum of $30.00, was endorsed by plaintiffs to the National Cash Register Company; a second check in the sum of $61.95 was endorsed by them to another finance company, and the money for the balance of the loan was apparently retained by plaintiffs, as the third check was endorsed by them in blank. On November 19, 1938, defendant issued its policy in the sum of $4,000.00, insuring plaintiffs for a term of one year against direct loss and damage by fire. The policy is a Standard insurance policy, to which is attached a Chicago Board Standard Contents

Form. The body of the policy contains a clause that "unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder." The Contents Form, in part, reads: "$4,000.00 on contents (as described herein) while contained in, on, or attached to the brick building situated 2934-36 West Madison Street, Chicago, Illinois. Note: For information only - The principal business of the insured is (describe nature of occupancy and merchandise covered) Tavern. The term CONTENTS as used in this policy shall (except as otherwise excluded) include merchandise, stock, store, office and shop furniture and fixtures and machinery, apparatus and equipment, supplies of every description; property on which liability is required to be specifically assumed by the conditions of the policy; the insured's interest in personal property of others when the insured's interest in such personal property is not otherwise insured; " " " The purchase of property on the installment or part payment plan shall not invalidate this insurance and this insurance shall also cover the insured's interest in and liability for property described in this policy, purchased on partial payments." On January 13, 1939, by authority of a search warrant, federal agents found a still and paraphernalia for the distillation of alcoholic spirits in the flat above No. 2936. On that day they arrested Charles M. Vito, one of the plaintiffs, and charged him with operating a still. He was lodged in the County Jail, but was released on bond and came back to the premises. There was a fire in the premises on the morning of January 29, 1939, between 5:00 a.m. and 7:55 a.m. Between the time that Vito was released from the County Jail, he was in and out of the premises from time to time. At the time of the fire the plaintiffs were operating the tavern without a license. At the April Term, 1939,

form. The body of the policy contains a clause that "unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while insured by a chattel mortgage, and during the time of such insurance this Company shall be liable only for loss or damage to any other property insured hereunder." The Declarations form, in part, reads: "$4,000.00 on contents (as described herein) while contained in, on, or attached to the brick building situated 6984-88 West Madison Street, Chicago, Illinois. Note: For information only - The principal business of the insured is (describe nature of occupancy and merchandise covered) Tavern. The term "MORTGAGE" as used in this policy shall (except as otherwise excluded) include merchandise, stock, store, office and shop furniture and fixtures and machinery, apparatus and equipment, supplies of every description; property on which liability is assumed in a separate agreement by the mortgagee of the policy; the insured's interest in personal property of others when the insured's interest in such personal property is not otherwise insured; " " The purchase of property on the installment or part payment plan shall not invalid in this insurance and this insurance shall also cover the insured's interest in and liability for property described in this policy, purchased on partial payments." On January 12, 1959, by assignment of a certain mortgage, Fidelity Savings Trust & Utility and pseudonymulis for the distribution of economic equities in the flat above No. 3024. On that day they attached Chester G. Vito, one of the plaintiffs, and charged him with operating a still. He was lodged in the County Jail, but was released on bond and came back to the premises. There was a fire in the premises on the morning of January 26, 1960, between 5:30 a.m. and 7:30 a.m. Between the time that Vito was released from the County Jail, he was in and out of the premises from time to time. At the time of the fire the plaintiffs were operating the tavern pleasant & Jimmy. In the April Term, 1960,

the Federal Grand Jury of this district returned an indictment against Vito and others, charging them with unlawfully operating a still. He was convicted and sentenced to serve a term of two years in the Federal Penitentiary and to pay certain fines and penalties. On May 29, 1929, plaintiffs filed their statement of claim in the Municipal Court of Chicago and asked for judgment against defendant, based on the fire loss they suffered while the chattels were covered by the insurance policy. The case was tried before the court without a jury and resulted in a finding and judgment against the defendant in the sum of $3,471.00, to reverse which this appeal is prosecuted.

The first point urged by defendant is that the breach of the condition in the policy against the property being incumbered by a chattel mortgage bars the plaintiffs' right to recover. Plaintiffs concede that under the law, a provision that the insurance company shall not be liable for loss or damage to personal property while incumbered by a chattel mortgage, is valid. Plaintiffs, however, contend that the language of the Chicago Board Standard Contents Form, which we have quoted, negatives the printed language in the body of the policy. This form states that "the term CONTENTS as used in this policy shall (except as otherwise excluded) include " " " the insured's interest in personal property of others when the insured's interest in such personal property is not otherwise insured." It is the law of Illinois that an ambiguous insurance contract is to be construed most strongly against the insurer. The rule, however, applies only in cases where reasonably intelligent men will honestly differ as to its meaning. If a policy of insurance is susceptible of two interpretations, that one will be adopted which is most favorable to the insured in order to indemnify him for the loss which he has sustained. "The rule that ambiguous language is to be construed most strongly against the insurer does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." (Crosse v. Knights of Honor,

the federal grand jury of this district returned an indictment against Vita and others, charging them with unlawfully operating a still. He was convicted and sentenced to serve a term of two years in the federal penitentiary and to pay certain fines and penalties. On May 29, 1924, plaintiffs filed their statement of claim in the municipal court of Chicago and asked for judgment against defendant, based on the fire loss they suffered while the contents were covered by the insurance policy. The case was tried before the court without a jury and resulted in a finding and judgment against the defendant in the sum of $8,471.50, to reverse which this appeal is prosecuted.

The first point urged by defendant is that the breach of the condition in the policy against the property being transported by a motor carrier for the "illegal" right or purpose. Plaintiffs concede that under the law, a provision that the insurance company shall not be liable for loss or damage to personal property while transported by a criminal carrier, is valid. "PROPERTY, however, contend that the language of the Chicago Board Standard Contents form, which we have quoted, negatives the printed language in the body of the policy. This form states that "the term PROPERTY as used in this policy shall (except as otherwise excluded) include * * * the insured's interest in personal property of others when the insured's interest in such personal property is not otherwise insured." It is the law of Illinois that an ambiguous insurance contract is to be construed most strongly against the insurer. The rule, however, applies only in cases where reasonably intelligent men will honestly differ as to its meaning. If a policy of insurance is susceptible of two interpretations, that one will be adopted which is most favorable to the insured in order to indemnify him for the loss which he has sustained. "The rule that ambiguous language is to be construed most strongly against the insurer does not authorize a perversion of language or the exercise of inventive genius for the purpose of creating an ambiguity where none exists." (Grace v. Insurance Co. of North

354 Ill. 80, 88.) Plaintiff insists that the rider abrogates the terms of the policy with reference to incumbrances, and that consequently at the time of the loss there was no violation of the terms of the policy. The chattel mortgage clause in the policy specifically provides that the company shall not be liable for loss or damage to property incumbered by a chattel mortgage "unless otherwise provided by agreement in writing added hereto." No agreement in writing was added to the policy, unless the "contents form" is to be construed as such added agreement. It will be observed that the language of the contents form upon which plaintiffs rely as abrogating the terms of the policy with reference to incumbrances, defines "contents" as including, unless otherwise excluded, the insured's interest in personal property of others. Hence, the insured's interest in the personal property of others is not within the coverage of the policy if "otherwise excluded" by the terms of the policy. In our view, there was no ambiguity in the language of the policy. We are of the opinion that there was no agreement in writing extending coverage to the personalty in the premises while incumbered by the chattel mortgage. Therefore, plaintiffs could not recover.

The second point argued by defendant is that the loss complained of occurred while the hazard was increased by means within the control or knowledge of the plaintiffs, and is excluded from coverage. A clause in the policy provides that unless otherwise provided by agreement in writing added thereto, the company shall not be liable for loss or damage "while the hazard is increased by any means within the control or knowledge of the insured." The raid on the still occurred on January 13, 1939, at which time Charles M. Vito, one of the plaintiffs, was arrested. The still ceased operating on that day and was removed from the premises. The fire occurred on January 19, 1939. Therefore, at the time of the fire there was no increased hazard because of the operation of the still. However,

Ind 111. 80, 88.) Plaintiff insists that the risks enumerates the terms of the policy with reference to insurrences, and that consequently at the time of the loss there was no violation of the terms of the policy. The chattel mortgage clause in the policy specifically provides that the company shall not be liable for loss or damage to property insured by a chattel mortgage "unless otherwise provided by agreement in writing added hereto." No agreement in writing was added to the policy, unless the "contents form" is to be considered as such added agreement. It will be observed that the language of the contents form upon which plaintiffs rely as supporting the terms of the policy with reference to insurrences, defines "contents" as including, unless otherwise excluded, the insured's interest in personal property of others. Hence, the insured's interest in the personal property of others is not within the coverage of the policy if "otherwise excluded" by the terms of the policy. In our view, there was no ambiguity in the language of the policy. We are of the opinion that there was no agreement in writing extending coverage to the property in the premises while insurrenced by the chattel mortgage. Therefore, plaintiffs could not recover.

The second point argued by defendant is that the loss complained of occurred while the property was insurrenced by means within the control or knowledge of the plaintiffs, and is excluded from coverage. A clause in the policy provides that unless otherwise provided by agreement in writing added thereto, the company shall not be liable for loss or damage "while the hazard is insurrenced by any means within the control or knowledge of the insured." The trial on the still occurred on January 12, 1929, at which time Charles E. Fitz, one of the plaintiffs, was arrested. The still became operating on that day and was removed from the premises. The fire occurred on January 29, 1929. Therefore, at the time of the fire there was no insurrenced hazard because of the operation of the still. However,

defendant infers that there was an increased hazard at the time of the fire due to the fact that Vito, after being released on bond from the County Jail, continued to visit the premises until the time of the fire. Defendant insists that all the circumstances in evidence in connection with the operation of the still and the activities of Vito, show that there was a moral hazard at the time of the fire. We are of the opinion that the fact that Vito was charged with a crime would not in itself be sufficient to establish that the hazard was increased at the time of the fire, particularly when there was another insured, namely William R. Katt, whose reputation was not questioned. Under this point defendant also maintains that the hazard was increased by the fact that the tavern was being operated without a license. It operated under a license in 1938. Up to the time of the fire the plaintiffs had not procured a license for 1939. We are unable to agree with the contention of defendant that the failure to procure a license increased the hazard.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment is entered here for costs for the defendant and against plaintiffs.

REVERSED AND JUDGMENT HERE FOR COSTS
FOR DEFENDANT AND AGAINST PLAINTIFFS.

DENIS E. SULLIVAN, P.J. AND MEDEL, J. CONCUR.

defendant argues that there was an increased hazard at the time of the fire due to the fact that Vito, either being released on bond from the County Jail, continued to visit the premises until the time of the fire. Defendant insists that all the circumstances in evidence in connection with the operation of the mill and the activities of Vito, show that there was a moral hazard at the time of the fire. We are of the opinion that the fact that Vito was charged with a crime would not in itself be sufficient to establish that the hazard was increased at the time of the fire, particularly when there was another incendiary, namely Gilles D. Ott, whose activities are not questioned. Under this point defendant also maintains that the hazard was increased by the fact that the tavern was being operated without a license. It operated under a license in 1958. Up to the time of the fire the plaintiff had not procured a license for 1959. We are unable to agree with the contention of defendant that the failure to procure a license increased the hazard.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment is entered here for costs for the defendant and against plaintiff.

REVERSED AND JUDGMENT HERE FOR DEFT.
FOR DETERMINATION OF DAMAGE ITEMS.

MILLS, P.J., and SCANLAN, J., concur.

41140

MARIE VYSKOCIL DOLEJS, Assignee of ANDREW DOLEJS,

Appellee,

v.

LIETUVA BUILDING & LOAN ASSOCIATION, formerly known as LOUD NAME LITHUANIAN BUILDING AND LOAN ASSOCIATION,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

9A

305 I.A. 498

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 4, 1938, Andrew Dolejs filed his amended statement of claim in the Municipal Court of Chicago. He alleged that on December 1, 1931, he was in possession of certain personal property of the fair and reasonable market value of $3,500; that on or about that date the defendant wrongfully seized the property and converted the same to its own use; that he demanded the return thereof and that defendant failed and refused to comply. In an affidavit of merits the defendant denied the allegations. The trial resulted in a verdict finding the issues against the defendant and assessing the plaintiff's damages in the sum of $800. While a motion for a new trial was pending, an assignment by the then plaintiff to Marie Vyskocil Dolejs of all of plaintiff's right, title and interest in the cause of action, verdict or judgment, rendered or to be rendered, was filed. The court overruled the motion for a new trial, entered judgment on the verdict and ordered that all subsequent proceedings be carried on in the name of the assignee. An appeal followed and this court in an opinion filed March 16, 1938, in case No. 39643, (Abst. 294 Ill. App. 608) reversed the judgment and remanded the cause for a new trial. After the cause was redocketed the defendant filed a counter claim in the sum of $134.93, grounded on a judgment for costs rendered in this court when the cause was remanded. In the answer to the counter claim the assignee asserted that the defendant was not entitled to a judgment against her. On October 9, 1939, the assignee filed a second amended statement of claim,

which was substantially the same as the one previously filed. In an affidavit of merits the defendant joined issue. The cause was tried before the court and a jury and resulted in a verdict for the plaintiff on both the second amended statement of claim and the counter claim, and damages were assessed in the sum of $5,500. Defendant moved for a new trial, for a judgment non obstante veredicto, and in arrest of judgment, all of which motions were overruled; and judgment was entered on the verdict, to reverse which this appeal is prosecuted. For convenience, we will refer to the plaintiff as Maria and to the assignor as Andrew. The assignor, Andrew, and the assignee, Maria, are husband and wife.

The first criticism leveled at the judgment is that Maria, as assignee and owner of a non-negotiable chose in action, did not in her pleadings on oath, allege that she is the actual bona fide owner of the chose in action, and did not on oath set forth how and when she acquired title. The record shows that at the time the assignment was offered in evidence, the attorney for the defendant announced to the court that he had no objection to its admission. It was thereupon admitted as an exhibit. As defendant did not make the point in the trial court, it may not urge it here.

Prior to the retrial of the case, plaintiff endeavored, by a motion in this court, to procure the original exhibits received in evidence in the first trial. Defendant, in counter suggestions, pointed out that the judgment for costs, rendered in this court, was unpaid. We denied the motion for leave to withdraw the exhibits. Thereupon plaintiff procured certified copies of the exhibits. These copies were received in evidence on the second trial. The second point now urged by defendant is that the court erred in admitting the certified copies of the exhibits. We have examined the copies and the originals and find that the copies are exact photostatic copies of the originals. Furthermore, the exhibits tend to prove matters about which there is little, if any, dispute. Defendant has not shown it suffered any harm by the introduction of the certified copies, rather than the originals.

with, we substantially the same as the one previously filed. In an affidavit of merits the defendant joined issue. The cause was tried before the court and a jury and resulted in a verdict for the plaintiff on both the social security payment of claim and the commercial claim, and damages were assessed in the sum of $1,000. Defendant moved for a new trial, for a judgment non obstante veredicto, and in arrest of judgment, all of which motions were overruled; and judgment was entered on the verdict, to reverse which this appeal is prosecuted. For convenience, we will refer to the plaintiff as Davis and to the defendant as Jackson. The assignor, Jackson, and the assignee, Davis, are husband and wife.

The first criticism levelled at the judgment is that Davis, as assignee and owner of a non-negotiable chose in action, did not in his pleadings on oath, allege that she is the actual bona fide owner of the chose in action, and did not do such an act here but and when she obtained title. The record shows that at the time the assignment was filed in evidence, the attorney for the defendant commented to the court that he had no objections to its admission. It was therefore admitted as an exhibit. No defendant did not make the point in the trial court, it may not raise it here.

Prior to the receipt of the case, admittedly commenced, by a notice in this court, to review the original motions presented in criminal case in the first trial. Defendant, in another appellation, pointed out that the judgment for costs, rendered in this court, was reversed. In denied the motion for leave to withdraw the exhibits. Thereupon plaintiff presented certified copies of the exhibits. Then counsel were requested to evidence on the second trial. The second point now urged by defendant is that the court erred in admitting the certified copies of the exhibits. It has examined the copies and the originals and find that the copies are exact photostatic copies of the originals. Furthermore, the exhibit just in question shows which claim there is little, if any, dispute. Defendant has not shown it suffered any loss by the introduction of the certified copies, neither that the originals.

The third point advanced by defendant is that plaintiff failed to prove the allegation of conversion by a preponderance of the evidence. Defendant also maintains that the court erred in denying its motion for a directed verdict. Defendant then states that the measure of damages in an action for wrongful conversion of personal property is the value of such property at the time of the conversion, and that the damages allowed by the jury are excessive. Finally, defendant argues that plaintiff failed to establish the necessary elements of agency to bind the defendant corporation. As all of these points involve a consideration of the evidence, we will consider them together.

Plaintiff does not challenge the statement that the allegation of conversion must be established by a preponderance of the evidence, and insists that there was ample evidence to show a conversion, as charged. Plaintiff also concedes that the measure of damages is the value of the property at the time of the conversion, but insists that the evidence as to damages supports the verdict. Plaintiff also asserts that she established the necessary elements of agency to bind the defendant.

In 1925 Andrew traded a farm in Michigan for the real estate and improvements located at 2301-3 West 22nd Place, Chicago, consisting of a two story brick building. At that time the property was subject to a first mortgage, owned by defendant, in the sum of $7,000, which Andrew agreed to pay. He paid about $3,000 on the mortgage. The defendant foreclosed the mortgage. The period of redemption expired in December, 1931, at which time the defendant took possession of the property. The first floor of the premises was divided into two stores, one of which had been occupied as a butcher shop and the other as a saloon. The second floor was used as a dance hall. In December, 1931, at the time defendant took possession of the real estate, the personalty which is the subject matter of the action, was in the premises. This property consisted of such furniture and equipment as is usually contained in

The Court quite answers by dictum to that jurisdiction failed to prove the allegation of conversion by a preponderance of the evidence. Defendant also maintains that the court erred in limiting its action for a directed verdict. Defendant then states that the actions of counsel in so moving for directed instructions of personal property is the value of such property at the time of the conversion, and that the damages claimed by the jury are excessive. Finally, defendant argues that plaintiff failed to establish the necessary elements of claims in that the defendant conversion. In all of these points involve a consideration of the evidence, we will consider them together.

Plaintiff does not challenge the statement that the allegation of conversion must be established by a preponderance of the evidence, and insists that there was ample evidence to show a conversion, as described. Plaintiff also contends that the measure of damages is the value of the property at the time of the conversion, but insists that the evidence as to damages supports the verdict. Plaintiff also contends that the established the necessary elements of proof to find the defendant.

In 1929 Andrew Swabek a film in Kansas for the Paul Ashby and Improvements located at 1201-4 East 22nd Place, Chicago, operating of a the Ashby Park Building. At that time the property was subject to a first mortgage, owned by defendant, in the sum of $7,000, which Andrew agreed to pay. He paid about $3,000 on the mortgage. The defendant foreclosed the mortgage. The period of redemption expired in January, 1931, at which time the defendant took possession of the property. The first floor of the premises was divided into two stores, one of which had been occupied as a barber shop and the other as a saloon. The second floor was used as a dance hall. In December, 1931, at the time defendant took possession of the pool room, the partnership which is the subject matter of the action, was in the premises. The partnership consisted of Jack Pavlatos and employed as it usually maintained in

saloons, butcher shops and dance halls. There is evidence which tends to show that in the month of December, 1931, the defendant, by its servants, put a lock on the doors of the building, and that because of such action, Andrew was unable to remove the fixtures. Testimony was introduced that in the years 1932, 1933 and 1935 the defendant leased the premises and chattels to various parties. The proof also shows that various demands and attempts were made by Andrew to procure the chattels. There was competent evidence in the record which warranted the jury in finding that Andrew had a right to the possession of the chattels; that they were wrongfully converted by the positive and tortious conduct of defendant; that demand was made for the return of the chattels, which was not complied with. Plaintiff proved her case substantially as laid in her second amended statement of claim. We have also considered the point, urged by defendant, that plaintiff failed to establish that the persons with whom Andrew dealt in the transaction, had a right to act as agents for the defendant. The record shows that during the trial, counsel for the respective parties stipulated that certain persons during certain periods were officers of the defendant corporation. We are convinced that this stipulation and the evidence in the case established the agency of the various persons mentioned in the testimony. Such testimony was, therefore, admissible for the purpose of binding the defendant.

Finally, we are called upon to determine whether the damages are excessive. In the previous trial, on substantially the same testimony, the jury awarded $800. We have carefully considered all of the testimony and are of the opinion that the damages are excessive, and that the judgment should not exceed $1,500. Therefore, if within 10 days from the filing of this opinion plaintiff will file in this court a remittitur of $1,000, the judgment against defendant will be affirmed for $1,500; otherwise, it will be reversed and the cause remanded to the Municipal Court of Chicago for a new trial.

NEBEL, J, and
DENIS E. SULLIVAN, P.J., CONCUR.

JUDGMENT AFFIRMED FOR $1,500 UPON REMITTITUR OF $1,000; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED.

salons, another player can hence talk. There is evidence with tends to show that in the month of December, 1921, the defendant, by its servants, put a lock on the door of the building, and that because of such action, Andrew was unable to remove the fixtures. Testimony was introduced that in the years 1920, 1921 and 1922 the defendant leased the premises and dentals to various parties. The proof also shows that various demands and attempts were made by Andrew to procure the dentals. There was conflicting evidence in the record which warranted the jury in finding that Andrew had a right to the possession of the dentals; that they were wrongfully converted by the positive and tortious conduct of defendant; that demand was made for the return of the dentals, which was not complied with. Plaintiff proved her case substantially as laid in her second counts statement of claim. We have also considered the point, urged by defendant, that plaintiff failed to establish that the persons with whom Andrew dealt in the transaction, had a right to act as agents for the defendant. The record shows that during the trial, counsel for the respective parties stipulated that certain persons during certain periods were officers of the defendant corporation. We are convinced that this stipulation and the evidence in the case substantiated the agency of the various persons mentioned in the testimony. Such testimony was, therefore, admissible for the purpose of binding the defendant.

Finally, we are called upon to determine whether the damages are excessive. In the previous trial, we substantially the same tentatively, the jury awarded $800. We have carefully considered all of the testimony and are of the opinion that the damages are excessive, and that the judgment should not exceed $1,000. Therefore, if within 10 days from the filing of this opinion plaintiff will file in this court a remittitur of $1,000, the judgment against defendant will be affirmed for $1,000; otherwise, it will be reversed and the cause remanded to the municipal court of Chicago for a new trial.

[illegible]

[illegible]

41147

HOMER D. McCANN,

Appellee,

v.

THE WOODSTOCK TYPEWRITER COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

305 I.A. 498

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Defendant is engaged in the business of manufacturing and selling typewriters. On July 1, 1934, plaintiff was hired by defendant as a typewriter salesman under a written agreement. The territory in which he was permitted to solicit business was known as the loop district of Chicago. In the fall of that year he was transferred to the west side section of Chicago. He was then shifted to the northwest side of Chicago, and then to the north side of Chicago. In October, 1936, he was given a new contract, which permitted him to solicit business in the area west of the river between Washington and 35th streets, which the parties call the west side territory. The contract provided for the payment of a salary of $25.00 a week and a commission of 10%, on typewriters sold, "said commission to be credited and paid in accordance with the rules of the company. The employee hereby acknowledges that he has seen and read the rules of the Company now in effect." The rules promulgated for the guidance of salesmen read, in part, as follows: "Orders. 1. Regular form of order * * * to be used by salesmen and signed by customer in every instance. 5. All sales orders must be approved by the manager. 6. When a concern of good financial standing issues its own purchase order forms, this purchase order will be sufficient, but salesmen should obtain the regular signed order in duplicate to confirm any purchase order when customer does not have proper credit rating. 7. All original orders must be signed in ink or indelible pencil. Contracts. 2. Contracts providing for future deliveries are not considered as orders, and will not be placed to the credit of salesmen

Defendant is engaged in the business of manufacturing and selling typewriters. On July 1, 1924, plaintiff was hired by defendant as a typewriter salesman under a written agreement. The territory in which he was permitted to solicit business was known as the last district of Chicago. In the fall of that year he was transferred to the west side section of Chicago. He was then shifted to the northwest side of Chicago, and then to the north side of Chicago. In October, 1926, he was given a new contract, which permitted him to solicit business in the area east of the river between Washington and 26th streets, which the parties call the east side territory. The contract provided for the payment of a salary of $75.00 a week and a commission of 10%, on typewriters sold, "said commission to be credited and paid in accordance with the rules of the company. The employee hereby acknowledges that he has read and read the rules of the company now in effect." The rules promulgated for the guidance of salesmen read, in part, as follows: "Orders. 1. Regular form of order * * * to be used by salesmen and signed by customer in every instance. 2. All sales orders must be approved by the manager. 3. When a concern of good financial standing issues its own purchase order form, this purchase order will be substituted, but salesmen should obtain the regular signed order in duplicate to confirm any purchase order upon customer does not have proper credit rating. 7. All original orders must be signed in ink or indelible pencil. Instructions. 1. Functions regarding the future activities are not conditions of orders, but will be stated to the credit of salesmen

on the books of the Company. The orders follow as separate parts of the transaction which are placed to the credit of the salesman. But in case the salesman should leave our employ, or accept a transfer to another branch, he will have no further interest in any contract, and no commission will be payable on orders placed by the customer and accepted by us after he has severed his connection, even though said contract may have been originated or closed by him." Starting with October, 1936, plaintiff began calling on all prospective customers in his territory. In the course of his duties, he called on Mr. Cecil B. Thomas, who was the buyer in the purchasing department of Sears Roebuck & Company. He succeeded in selling 50 typewriters to Sears Roebuck & Company in February, 1937, and 25 additional typewriters to the same corporation in March or April, 1937. He was paid a commission on these 75 typewriters at the rate of 10% on the sale price. He again called on Mr. Thomas about the middle of June, 1937, and endeavored to sell 100 more typewriters. Plaintiff left on his vacation on June 18, 1937, and returned on July 6, 1937. At that time Jacob A. Thrasher, who was then Chicago sales manager, informed plaintiff that he was going to reduce him to the status of a junior salesman, in which capacity he would be paid a salary and no commission. Plaintiff declined to continue as a salesman under the proposed change. He maintained that he was entitled to a commission of 10% on the sale of an additional 100 typewriters to Sears Roebuck & Company and on the sale of typewriters to three other parties. He filed a statement of claim in the Municipal Court of Chicago on January 3, 1939, and therein claimed the sum of $870.20 on the basis of 100 typewriters which he averred he was instrumental in selling to Sears Roebuck & Company at a price of $8,702.00. He also claimed a commission of $112.50 on the basis of 10 typewriters, which he alleged he sold to the Cruver Manufacturing Company, plus $11.25 as a balance due him for having sold two typewriters to the Outlook Envelope Company, and a balance of $5.675 on the basis of 1 typewriter, which he averred he sold to George F. McKiernan, or a total sum of $799.625. An affidavit

on the books of the Company. The orders taken on separate parts of the transaction which are placed to the credit of the salesman. But in case the salesman should leave our employ, or accept a transfer to another branch, he will have no further interest in any contract, and no commission will be payable on orders placed by the customer and accepted by us after he has severed his connection, even though said contract may have been originated or closed by him." Starting with October, 1924, plaintiff began selling on its commission contracts in his territory. In the course of his duties, he called on Mr. Jacob Thomas, who was the buyer in the purchasing department of Sears Roebuck & Company. He succeeded in selling 50 typewriters to Sears Roebuck & Company in January, 1927, and 25 additional typewriters to the same corporation in March or April, 1927. He was paid a commission on these 75 typewriters at the rate of 10% on the sale price. He again called on Mr. Thomas about the middle of June, 1927, and endeavored to sell 100 more typewriters. Plaintiff left on his vacation on June 16, 1927, and returned on July 6, 1927. At that time Joseph C. Thrasher, who was then Chicago sales manager, informed plaintiff that he was going to reduce him to the status of a junior salesman, in which capacity he would be paid a salary and no commission. Plaintiff declined to continue as a salesman under the proposed change. He maintained that he was entitled to a commission of 10% on the sale of an additional 100 typewriters to Sears Roebuck & Company and on the sale of typewriters to three other parties. He filed a statement of claim in the Municipal Court of Chicago on January 9, 1928, and thereon claimed the sum of $270.00 on the basis of 100 typewriters which he averred he was instrumental in selling to Sears Roebuck & Company at a price of $3,750.00. He also claimed a commission of $117.00 on the sale of 10 typewriters, which he alleged he sold to the Cover Manufacturing Company, plus $11.70 as a balance due him for having sold two typewriters to the United Typewriter Company, and a balance of $0.00 on the sale of 1 typewriter, which he averred he sold to George E. Nottesser, or a total sum of $[illegible]. In additional

of merits filed by the defendant denied that the plaintiff was entitled to recover. A trial before the court and a jury resulted in a verdict against the defendant for $734.13. The defendant moved for a judgment notwithstanding the verdict as to each separate item, and in the alternative for a new trial. The court sustained the motion as to the sale to the Gruver Manufacturing Company. Plaintiff thereupon remitted the sum of $97.05, and judgment was entered on the balance of the verdict amounting to $637.08. This appeal followed.

At this time there are three items in dispute on each of which plaintiff claims that he is entitled to a commission of 10% of the sale price. It is unnecessary to consider the claim for commission on the 14 typewriters sold to the Gruver Manufacturing Company in the latter part of November, 1936, as plaintiff remitted the sum of $97.05, representing the commission on this transaction, and no cross errors are assigned, because of the action of the court in directing a verdict against plaintiff as to that item. The three items now in dispute on which plaintiff claims he is entitled to a commission are (1) the 2 typewriters sold to Outlook Envelope Company in the latter part of February, 1937; (2) 1 typewriter sold to George F. McKiernan in the early part of March, 1937, and (3) 100 typewriters sold to Sears Roebuck & Company on July 6, 1937. It is conceded that plaintiff sold the typewriters to the Outlook Envelope Company and George F. McKiernan. These typewriters were sold on a barter basis. Defendant maintains that at the time these sales were being considered, plaintiff submitted the barter propositions to its Chicago sales manager, who approved the sales on a barter basis on the condition that plaintiff would agree to a commission of only 5% instead of the usual 10%, and that plaintiff agreed to the reduced commission. In the trial plaintiff denied that there was any agreement whereby he agreed to waive the 10% commission. He was paid on a basis of 5% commission. The jury allowed him an additional 5%

of merits filed by the defendant denied that the plaintiff was entitled to recover. A trial before the court and a jury resulted in a verdict against the defendant for $724.15. The defendant moved for a judgment notwithstanding the verdict or to vacate the same, and in the alternative for a new trial. The court sustained the motion as to the sale to the Grover Manufacturing Company. Plaintiff thereupon claimed the sum of $97.05, and judgment was entered on the balance of the verdict amounting to $627.10. This appeal followed.

At this time there are three items in dispute on each of which plaintiff claims that he is entitled to a commission of 15% of the sale price. It is unnecessary to consider the claim for commission on the 14 typewriters sold to the Grover Manufacturing Company in the latter part of November, 1934, as plaintiff remitted the sum of $97.05, representing the commission on this transaction, and no cross errors are assigned, because of the action of the court in directing a verdict against plaintiff as to that item. The three items now in dispute on which plaintiff claims he is entitled to a commission are (1) the 2 typewriters sold to Outlook Envelope Company in the latter part of February, 1934; (2) 1 typewriter sold to George F. Mokiternan in the early part of March, 1934, and (3) 100 typewriters sold to Jane Jordons & Company on July 9, 1934. It is conceded that plaintiff sold the typewriters to the Outlook Envelope Company and George F. Mokiternan. These typewriters were sold on a barter basis. Defendant maintains that at the time these sales were being considered, plaintiff submitted the barter propositions to its Chicago sales manager, who approved the sales on a barter basis on the condition that plaintiff would agree to a commission of only 5% instead of the usual 15%, and that plaintiff agreed to the reduced commission. In the trial plaintiff denied that there was any agreement whereby he agreed to waive the 15% commission. He was paid on a basis of 5% commission. The jury allowed him an additional 10

commission, which amounted to $5.67 on the sale of 1 typewriter to George F. McKiernan, and $11.26 on the 2 typewriters sold to the Outlook Envelope Company, or a total of $16.88. Clearly, the right to the commission on these two items presented a question as to the credibility of the witnesses, which the jury resolved in favor of plaintiff, and we would not be justified in disturbing the verdict in that respect.

The chief controversy centers about the sale of the 100 typewriters to Sears Roebuck & Company on July 6, 1937. The net sale price was $6,102.00, which, if plaintiff's position is correct, would entitle him to a commission of $610.20 on this transaction. Defendant argues that the court erred in failing to direct a verdict in its favor and in failing to enter a judgment non obstante veredicto. Plaintiff insists that the record presents a purely factual situation which has been decided by the jury. In passing on a motion for a judgment non obstante veredicto on to direct a verdict we are not permitted to weigh the evidence. If there is in the record any evidence from which, the jury could, without acting unreasonably in the eye of the law, find that the material averments of the statement of claim have been proved, a verdict may not be directed, nor should the court enter a judgment non obstante veredicto. It is our duty to view the testimony in the most favorable light from the plaintiff's standpoint. Having these rules in mind, we turn to a consideration of the evidence. Plaintiff testified that he called on Mr. Thomas, the buyer for Sears Roebuck & Company, about the middle of June, 1937, and solicited another order of 100 typewriters; that Thomas said "I would get an order for 100 machines to be delivered in July, not before July. As to why he could not give me a written order before July 1st, he said there was another appropriation or something, they couldn't buy any more - they couldn't take acceptance or any more machines until that month. I don't know the reason for it but I had to accept his word

commission, which amounted to $8.00 on the sale of 1 typewriter to George F. McClennan, and $11.50 on the 2 typewriters sold to the Outlook Envelope Company, or a total of $18.50. Clearly, the right to the commission on these two items presented a question as to the credibility of the witnesses, which the jury resolved in favor of plaintiff, and we would not be justified in disturbing the verdict in that respect.

The other controversy centers about the sale of the 100 typewriters to Frank Thomas on July 8, 1907. The net sale price was $6,382.00, which, if plaintiff's position is correct, would entitle him to a commission of $620.20 on this transaction. Defendant argues that the court erred in failing to direct a verdict in its favor and in failing to enter a judgment non obstante veredicto. Plaintiff insists that the record presents a merely factual situation which has been decided by the jury. In passing on a motion for a judgment non obstante veredicto or to direct a verdict we are not permitted to weigh the evidence. If there is in the record any evidence from which, the jury could, without acting unreasonably in the eye of the law, find that the material averments of the statement of claim have been proved, a verdict may not be directed, nor should the court enter a judgment non obstante veredicto. It is our duty to view the testimony in the most favorable light from the plaintiff's standpoint. Having these rules in mind, we turn to a consideration of the evidence. Plaintiff testified that he called on Mr. Thomas, the buyer for Sears Roebuck & Company, near the middle of June, 1907, and solicited another order of 100 typewriters; that Thomas said "I could get an order for 100 machines to be delivered in July, not before July. Is why he could not give me a written order before July 1st, he said there was another opportunition or something, they couldn't buy any more - they wouldn't take penitentiary in any more machines until 1st month. I don't know the reason for it but I had to accept his word

for it. I told him I was going on my vacation and I would see him after I came back from my vacation." Witness further testified that the supervisor in the district assigned to him was Mr. Harold Muhn, who was his immediate superior; that Mr. Thrasher was the Chicago sales manager; that he (plaintiff) called on Thrasher on June 17, 1937; that he told Thrasher that he had an order for 100 machines from Sears Roebuck & Company; that he asked Thrasher for permission to go on his vacation commencing on Friday, June 18, 1937, instead of Saturday; that Thrasher answered, "That is fine, Mac;" that defendant paid him $75.00, being one week's salary due June 19, 1937, and two weeks in advance covering the vacation period up to and including July 3, 1937; that Independence Day fell on a Sunday and was celebrated on the following day, and that, therefore, he did not come back to work until Tuesday, July 6, 1937; that when he returned to work Thrasher told him he was going to change his contract and put him to work as a junior salesman on a straight salary basis without commission; that he (plaintiff) informed Thrasher that he had a commission coming for 100 machines which he had sold to Sears Roebuck & Company, and that he, the witness, refused to accept the change in his terms of employment; and that Thrasher then caused to be delivered to him a check for $35.00, less a deduction of 35 cents for social security tax, Witness further testified that on the same morning, he cleared out his desk and left. He stated that he arrived at defendant's office on the morning of July 6, 1937, at 9 o'clock; that Thrasher was "awfully busy" and "it was rather late when I got to talk to him." Cecil B. Thomas testified that in June and July, 1937, he was the buyer for Sears Roebuck & Company, and that the order for the 100 typewriters was handed to the salesman. Mr. Thrasher testified for defendant that at his, (witness's) request, plaintiff came to his office; that he saw plaintiff about June 18, 1937; that plaintiff was going on his vacation; that he informed plaintiff that he was making a change and that he wished plaintiff to work as a junior salesman on

for it. I told him I was going on my vacation and I would see him after I came back from my vacation." Witness further testified that the supervisor in the district assigned to him was Mr. Harold Brown, who was his immediate superior; that Mr. Thrasher was the Chicago sales manager; that he (plaintiff) called on Thrasher on June 17, 1927; that he told Thrasher that he had an order for 100 machines from Sears Hardwick & Company; that he asked Thrasher for permission to go on his vacation commencing on Friday, June 18, 1927, instead of Saturday; that Thrasher answered, "That is fine, son;" that defendant paid him $75.00, being one week's salary due June 18, 1927, and two weeks in advance covering the vacation period up to and including July 2, 1927; that Independence Day fell on a Sunday and was celebrated on the following day, and that, therefore, he did not come back to work until Tuesday, July 5, 1927; that when he returned in early July Thrasher told him he was going to change his contract and put him in Chicago a junior salesman on a straight salary basis without commissions; that he (plaintiff) informed Thrasher that he had a commission coming for 100 machines which he had sold to Sears Hardwick & Company, and that he, the witness, refused to accept the change in his terms of employment; and that Thrasher then caused to be delivered to him a check for $88.00, less a deduction of $5 dues for social security tax. Witness further testified that on the same morning, he cleared out his desk and left. He stated that he arrived at defendant's office on the morning of July 5, 1927, at 9 o'clock; that Thrasher was "awfully busy" and "it was rather late when I got to talk to him." Cecil E. Thomas testified that in June and July, 1927, he was the buyer for Sears Hardwick & Company, and that the order for the 100 typewriters was handled by the witness. Mr. Thrasher testified for defendant that at his (witness's) request, plaintiff came to his office; that he saw plaintiff about June 18, 1927; that plaintiff was going on his vacation; that he informed plaintiff that he was making a change and that he wished plaintiff to work as a junior salesman on

a straight salary with no commission; that he was changing the position of plaintiff because plaintiff was not making enough sales; that he next saw plaintiff on July 8, 1937, at which time plaintiff declined to accept the position of junior salesman. He further testified that plaintiff then resigned, cleaned out his desk and left the premises.

At the time plaintiff called on Mr. Thomas of Sears Roebuck & Company, the latter did not place any order. Thomas informed plaintiff that he could not give him a written order before July 1st, as there was no appropriation for such purchases. The written instructions to the salesmen, which were binding on plaintiff, state that contracts for future deliveries are not considered as orders and "will not be placed to the credit of the salesman on the books of the company." These instructions further specify that no commission will be payable on orders placed by the customer and accepted after the salesman has severed his connection with the company. The evidence shows that Sears Roebuck & Company did place an order with the defendant for 100 typewriters on July 8, 1937. The instructions to salesmen contemplates that orders shall be taken on forms furnished by defendant and that all sales orders must be approved by the manager, and also provides that when a concern of good financial standing issues its own purchase order forms, such purchase order will be sufficient. The record shows that Sears Roebuck & Company delivered a written order to defendant on July 8, 1937. There was not then, and is not now, any question as to the good financial standing of Sears Roebuck & Company. There was not then, nor is there now, any question as to the approval of the sale by the "manager" of defendant. It is obvious that defendant was anxious at all times to sell its product to Sears Roebuck & Company. The sale of the 100 typewriters, according to the testimony of plaintiff, was solicited by him before he left on his vacation. The sale took place in his territory, and if he was still in the employ of the defendant, he would be entitled to the commission of $810.00. According to the testimony of plaintiff he was in the employ of defendant on

a straight salary with no commissions; that he was changing the position of plaintiff because plaintiff was not making enough sales; that he next was plaintiff on July 6, 1927, at which time plaintiff declined to accept the position of junior salesman. Mr Turner testified that plaintiff then resigned, stormed out his desk and left the premises.

At the time plaintiff called on Mr. Thomas of Jerre Hoehnen & Company, the latter did not place any order. Thomas informed plaintiff that he could not give him a written order before July 1st, as there was no appropriation for such purchases. The written instructions to the salesmen, which were binding on plaintiff, state that contracts for future deliveries are not considered as orders and "will not be placed to the credit of the salesman on the books of the company." These instructions further specify that no commission will be payable on orders placed by the customer and accepted after the salesman has severed his connections with the company. The testimony shows that Jerre Hoehnen & Company did place an order with the defendant for 100 typewriters on July 6, 1927. The instructions to salesmen contemplate that orders shall be taken on forms furnished by defendant and that all sales orders must be approved by the manager, and also provides that upon a contract of good financial standing issue its own purchase order form, such purchase order will be sufficient. The record shows that Jerre Hoehnen & Company delivered a written order to defendant on July 6, 1927. There was not then, and is not now, any question as to the good financial standing of Jerre Hoehnen & Company. There was not then, nor is there now, any question as to the approval of the sale by the "manager" of defendant. It is admitted that defendant has assigned to all state to sell its product to Jerre Hoehnen & Company. The sale of the 100 typewriters, according to the testimony of plaintiff, was solicited by his mother-in-law as a gratuity. The sale took place in his territory, and if he was still in the employ of the defendant, he would be entitled to the commission of $210.00. According to the

July 6, 1937. Plaintiff insists that he was paid a salary until July 10, 1937, and that, therefore, he was in the employ of defendant until July 10, 1937. It is undisputed, however, that on the morning of Tuesday, July 6, 1937, plaintiff ceased to be a salesman for defendant. At that time he was offered a position as junior salesman on a different basis. He declined to accept the position. Thereupon he went to his desk in defendant's office and removed his effects therefrom and left the premises. The relationship of employer and employee requires the consent of both parties. Therefore, it is manifest that plaintiff was not in the employ of the defendant from the time on the morning of July 6, 1937, when he resigned by refusing to accept the new position offered to him. According to the instructions to salesmen, which were binding on plaintiff, he is not entitled to be credited with the commission unless the order for the 100 typewriters was placed by Sears Roebuck & Company before plaintiff severed his connection with defendant. The record shows that the order by Sears Roebuck & Company was placed on July 6, 1937, and that plaintiff severed his connection with defendant on the morning of July 6, 1937. Hence, there is nothing in the record to establish that the order for the typewriters was placed prior to the time that plaintiff resigned.

Defendant urges that the court erred in giving to the jury instruction known as No. 2, reading as follows:

> "The jury are further instructed by the court that if you believe from the evidence that plaintiff developed the order for the sale of 100 typewriters to Sears Roebuck & Company by the defendant and that said sale was the fruit of plaintiff's efforts, he is entitled to recover the commission on said sale."

This instruction ignored the defendant's written instructions to salesmen that they must obtain a written order in order to be entitled to a commission, and that a salesman who leaves the employ of defendant is not entitled to commissions on orders thereafter placed, even though he was instrumental in originally soliciting such orders. This instruction was clearly erroneous. Instruction No. 4 reads:

> "The jury are further instructed by the court that if you find from the evidence the sale of typewriters were made as alleged

July 6, 1927. Plaintiff insists that he was paid a salary until July 10, 1927, and that, therefore, he was in the employ of defendant until July 10, 1927. It is undisputed, however, that on the morning of Tuesday, July 6, 1927, plaintiff proved to be a nuisance for defendant. At that time he was offered a position as junior salesman on a different beat. He declined to accept the position. Thereupon he went to his desk in defendant's office and removed his effects therefrom and left the premises. The relationship of employer and employee terminate the consent of both parties. Therefore, it is manifest that plaintiff was not in the employ of the defendant from the time on the morning of July 6, 1927, when he resigned by refusing to accept the new position offered to him. According to the instructions to salesmen, which were binding on plaintiff, he is not entitled to be credited with the commission unless the order for the 100 typewriters was placed by Sears Goodwin & Company before plaintiff severed his connection with defendant. The record shows that the order by Sears Goodwin & Company was placed on July 6, 1927, and that plaintiff severed his connection with defendant on the morning of July 6, 1927. There is nothing in the record to establish that the order for the typewriters was placed prior to the time that plaintiff resigned.

Defendant urges that the court erred in giving to the jury instruction known as No. 5, reading as follows:

"The jury are further instructed by the court that if you believe from the evidence that plaintiff terminated the order for the sale of 100 typewriters to Sears Goodwin & Company by the defendant and that said sale was the fruit of plaintiff's efforts, he is entitled to recover the commission on said sale."

This instruction ignored the defendant's written instructions to salesmen that they must obtain a written order in order to be entitled to a commission, and that a salesman who leaves the employ of defendant is not entitled to commissions on orders thereafter placed, even though he was instrumental in originally soliciting such orders. This instruction was directly erroneous. Instruction No. 5 reads:

"The jury are further instructed by the court that if you from the evidence the sale of typewriters were made as alleged

in the complaint in accordance with the terms of the employment agreement of plaintiff, he is entitled to recover."

This instruction should not have been given. "We have repeatedly held that the court should not give a peremptory instruction to find for the plaintiff if the jury should find that he had proved his case as alleged in the declaration, and further, that it is the duty of the court to define the issues to the jury without referring them to the pleadings to ascertain what they are." (Bernier v. Illinois Central R. R. Co., 296 Ill. 464, 472.) The first instruction offered by the plaintiff reads:

"The court instructs the jury that if you believe from the evidence plaintiff was in the employ of the defendant on July 6, 1937, the day that the written order of Sears Roebuck & Company for 100 typewriters from the defendant was delivered, he is entitled to recover."

In the trial court there was no objection to the giving of this instruction. No objection thereto is voiced in this court. Apparently, the defendant recognized that the instruction stated the issue to be decided as to the 100 typewriters.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter a partial judgment on the verdict for the plaintiff and against the defendant in the sum of $16.88, (based on the sales of typewriters to the Outlook Envelope Company and George F. McKiernan) and for a new trial in accordance with the views herein expressed as to the claim for commissions on the sale of the 100 typewriters by the defendant to Sears Roebuck & Company.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

in the complaint in accordance with the terms of the employment agreement of plaintiff, he is entitled to recover."

This instruction should not have been given. We have repeatedly held that the court should not give a peremptory instruction to find for the plaintiff if the jury should find that he had proved his case as alleged in the declaration, and further, that it is the duty of the court to define the issues to the jury without referring them to the pleadings to ascertain what they are." (Bowler v. Illinois Central R. R. Co., 238 Ill. 484, 472.) The first instruction offered by the plaintiff reads:

"The court instructs the jury that if you believe from the evidence plaintiff was in the employ of the defendant on July 4, 1917, the day that the rights under of facts between a commodity for 100 typewriters from the defendant was delivered, he is entitled to recover."

In the trial court there was no objection to the giving of this instruction. No objection thereto is voiced in this court. Apparently, the defendant recognized that the instruction stated the issue to be decided as to the 100 typewriters.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter a partial judgment on the verdict for the plaintiff and against the defendant in the sum of $16.88, (based on the sales of typewriters to the Illinois Corrugated Company and Gerge F. Mathewson) and for a new trial in accordance with the views herein expressed as to the claim for commissions on the sale of the 100 typewriters by the defendant to Harry Bowler & Company.

REVERSED AND REMANDED WITH DIRECTIONS.

CLAYTON E. MILLETTE, P.J., LEO SCHAD, J., concur.

40795

WILLIAM J. SANDBERG AND GEORGE N. SANDBERG, as trustees under the Last Will and Testament of Nels John Sandberg, deceased,

Appellees,

vs.

JOHN SANDBERG,
and Appellant.
THE TRUST COMPANY OF CHICAGO, as Conservator of the Estate of Charles A. Sandberg, Insane,

Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

305 I.A. 499

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiffs filed their bill of complaint in Chancery in which they prayed that they be confirmed as trustees for certain real estate owned by Charles A. Sandberg, incompetent, which said real estate had been devised to the said insane person by his father, Nels John Sandberg, by his last will and testament, dated March 23, 1914, from the fourth paragraph of which the following appears:

> "Fourth: I hereby bequeath to my insane son, Charles A. Sandberg, my entire property on Carl and Nelle Street, Nos. 1-7 Carl Street. I appoint my sons William and George Trustees of this fund. The said trustees to serve without compensation or charge or other fees to be charged without consent of the heirs."

and the said plaintiffs further prayed for leave to enter into a certain lease with Nel Kagen for a period of twenty-five years at graduated rental of from $1,500 to $1,750 per year. Answers were filed by the defendant John A. Sandberg, who is the heir of said insane person and the duly appointed Guardian ad Litem for said Charles A. Sandberg, incompetent. On March 12, 1939, a decree was entered in the Circuit Court in favor of the plaintiff wherein the court found the issues for the plaintiffs and confirmed the plaintiffs as trustees of the rents, issues and profits of the real estate as devised to and owned by Charles A. Sandberg, incompetent. The decree further provided that The

Trust Company of Chicago, as conservator of the estate of Charles A. Sandberg, incompetent, be authorized to procure and enter into a lease with said Sol Kogan for a period of twenty-five years at the said above mentioned figure, and the conservator turn over the rents, issues and profits thereof as received to these plaintiffs, as trustees.

The decree further provided that the court retain jurisdiction of this cause to approve the lease and administer the trust estate. On April 1, 1938, John E. Sandberg, individually, and as Guardian ad litem for Charles A. Sandberg, incompetent, perfected his appeal by filing his notice of appeal praying an appeal to the Appellate Court of Illinois, First District; subsequent thereto on petition and motion of the plaintiffs, the court, on the 11th day of April 1938, after the said notice of appeal had been filed, over the objection of said John E. Sandberg, removed the said John E. Sandberg as Guardian ad litem and appointed one E. V. Libonati as guardian in his place and stead, to which order John E. Sandberg duly objected and excepted.

The defendant John E. Sandberg contends that the Circuit Court had no jurisdiction to enter the order of April 11, 1938, removing John E. Sandberg as guardian ad litem and appointing E. V. Libonati in his place, and that the court was without jurisdiction to enter the order in the cause after a notice of appeal had been filed in the lower court, as provided for by statute. This provision appears in Ch. 110, Par. 200, Sec. 76, of the Practice Act (Ill. Rev. Stats. 1939) in the second provision of the Act, where it is provided:

> "(2) An appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court. After being duly perfected no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected shall be deemed jurisdictional."

This court in the case of David Levi, Receiver, Plaintiff in Error v. Charles E. Sandlas, Defendant in Error, 304 Ill. App.534 passed upon a question similar in character to that in the instant

[illegible] Bonney of Chicago, as conservator of the estate of Charles A. Lundberg, incompetent, be authorized to remove and enter into a lease with said Bell for a period of twenty-five years at the said above mentioned figure, and the conservator then over the rents, issues and profits thereof as received in these proceedings, as therefore.

The decree further provided that the court retain jurisdiction of this cause to oppose the issue and administer the trust estate. On April 2, 1928, John C. Lundberg, individually, and as guardian ad litem for Charles A. Lundberg, incompetent, prosecuted his appeal by filing his notice of appeal therein as appeal to the Appellate Court of Illinois, First District. Subsequent proceedings on petition and motion of the plaintiffs, the court, on the 12th day of April 1928, after the said notice of appeal had been filed, over the objection of said John C. Lundberg, removed the said John C. Lundberg as guardian ad litem and appointed one C. C. Kimmerly as guardian in his place and stead, to which order John C. Lundberg duly objected and excepted.

The defendant John C. Lundberg contends that the Circuit Court had no jurisdiction to enter the order of April 12, 1928, removing John C. Lundberg as guardian ad litem and appointing C. C. Kimmerly in his place, and that the court had without jurisdiction to enter the order in the same after a notice of appeal had been filed in the lower court, as provided for by statute. This provision appears in Ch. 110, Par. 101, Sec. 96, of the Practice Act Ill. Rev. Stats. 1927) in the second sentence of the 1st, where it is stated:

"(2) An appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court. After being duly perfected an appeal shall be dismissed without notice, and on any other time than by which the appeal is perfected shall be deemed jurisdictional."

This court in the case of Cobb Lumber Company, Plaintiff in error v. Thurber C. Wadley, Defendant in error, 324 Ill. App.

case, where the trial court removed a receiver, the plaintiff in error, and appointed the defendant in error as receiver, upon the giving and approval of a bond, to act in his place. The Appellate Court in that case said:

> "The critical question in the case is whether on July 3, 1915, when the instant case was instituted in the Municipal Court, the plaintiff in error was entitled to sue as receiver. The final decree, in the case in which plaintiff in error was receiver, was entered in the Circuit Court on April 3, 1915. An appeal was taken from that decree to this court on May 8, 1915, and the appeal bond filed in the Circuit Court on May 8, 1915. On June 5, 1915, a month after the appeal was perfected, the Circuit Court entered its order providing for the removal of the receiver upon the approval and filing of a $12,000 bond by the defendant in error. That bond was approved on July 14, 1915, and filed on July 17, 1915. It follows, therefore, that the appeal from the final decree in the Circuit Court to this court had been perfected before the order of the Circuit Court for the removal of the receiver was entered.
>
> It is the law 'that a perfected appeal operates to stay any further proceedings by the court rendering the judgment or decree appealed from.' The People v. Pam, 278 Ill. 181; In re Thatcher, 7 Ill. (2 Gilm)167; Ilgen v. Ilgen, 183 Ill. 180; Jenkins v. Jenkins, 81 Ill. 167."

The rule of law that applies is that praying for and perfecting an appeal during the pendency of a motion to vacate the judgment waives the motion and deprives the trial court of jurisdiction to enter any order thereon, and the appeal is therefore from a final judgment notwithstanding the pendency of such motion. McCoy v. Acme Printing Co., 278 Ill. 378.

The plaintiffs reply to defendant's contention that the Circuit Court had no jurisdiction to enter the order of April 11, 1939, removing John C. Sandberg as guardian ad litem and appointing L. M. Libonati in his place by stating that the court within thirty days from the entry of the decree in question entered this order, and under the statute it was within the period allowed the court to amend or otherwise enter such order within the thirty day limit after the entry of the judgment or decree. This, however, is not an answer to the question that by the service of notice of

case, where the trial court removed a receiver, the plaintiff in error, and appointed the defendants in error as receivers, upon the giving and approval of a bond, as set in his place. The Appellate Court in that case said:

> "The original question in the case is whether on July 2, 1920, when the instant case was instituted in the municipal court, the plaintiff in error was entitled to sue as receiver. The trial decree, in the case in which plaintiff in error was receiver, was entered in the Circuit Court on April 2, 1920. It appears from a decree that dates as this court said on May 5, 1920, and the appeal was filed in the Circuit Court on May 6, 1920. On June 2, 1920, a month after the appeal was perfected, the Circuit Court entered its order revoking the the receivership of the receiver upon the approval and filing of a $10,000 bond by the defendants in error. That bond was approved on July 14, 1920, and filed on July 17, 1920. It appears, therefore, that the appeal from the final decree in the Circuit Court to this court had been perfected before the order of the Circuit Court for the removal of the receiver was entered.
>
> It is the law that a pending appeal deprives the lower court of jurisdiction to make any further proceedings in the court therein except in aid of the jurisdiction of the appellate court. The Circuit Ct. Rep. 170 (1911, 12 Cir. Court Reports, 7 Ill. 2d 87(1956); Kane v. Kane, 14 Ill. App. 2d 1, Lockhart v. Lockhart, 21 Ill. App. 2d 1.'"

The rule of law that applies is that pending for and participating an appeal during the pendency of a motion to vacate the judgment, waives the motion and deprives the trial court of jurisdiction to enter any order thereon, and the appeal is therefore a final judgment notwithstanding the pendency of such motion. Kaner v. Lane Trucking Co., 19 Ill. App.

The plaintiffs reply to defendant's contention that the Circuit Court had no jurisdiction to enter the order of April 12, 1929, removing John E. Vaughnn as guardian ad litem and appointing E. E. Gilbert in his place by stating that the court within thirty days from the entry of the decree in question entered this order, and under the statute it was within the period allowed the court to amend or otherwise enter such order within the thirty day limit after the entry of the judgment or decree. This, however, is not an answer to the question that by the service of notice of

appeal by the defendant an appeal was perfected, and the statute which we have quoted provides that no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected shall be deemed jurisdictional. We are of the opinion that under the provision of the statute quoted, the appeal was perfected, but the plaintiffs still urge that the order in question was entered before a supersedeas bond was signed by the defendant and approved by the court. While it is true that in order to stop operation of the judgment or decree a supersedeas must be granted and bond signed, still that does not affect a decree where an appeal has been taken, as was done in the instant case. This is set out by the provision of Par. 206, Sec. 82, Ch. 110 of the Civil Practice Act, where it is provided, in part:

> "An appeal to the Appellate or Supreme Court shall operate as a supersedeas only if and when the appellant, after notice duly served, shall give and file a bond in a reasonable amount to secure the adverse party."

So, under the facts in this case it is apparent that an appeal was taken but no supersedeas was granted until the court ordered that a supersedeas be granted upon the execution by the defendant of a bond, which was after the date when the order in question was entered. An appeal may be availed of even though a supersedeas may not be granted, and if that is so it would seem that the court would be without jurisdiction to remove the parties who are appealing, upon the motion of one of the adverse parties. In doing so the court would be depriving the party litigant of the right to appeal, as provided for by law, and since the appeal was pending the court erred in entertaining the motion to remove the defendant John A. Sandberg as Guardian *ad litem* of Charles A. Sandberg, *non compos mentis*.

The defendant contends that the Circuit Court had no jurisdiction to consider the complaint filed by the plaintiffs or grant

appeal by the defendant an appeal was perfected, and the statute which we have quoted provides that no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected shall be deemed jurisdictional. We are of the opinion that under the provision of the statute quoted, the appeal was perfected, but the plaintiffs still urge that the order in question was entered before a supersedeas bond was signed by the defendant and approved by the court. While it is true that in order to stay execution of the judgment or decree a supersedeas must be granted and bond signed, still that does not affect a decree where an appeal has been taken, as was done in the instant case. This is set out by the provision of Sec. 306, Gen. St. 1909, Chap. 110 of the Civil Procedure Act, where it is provided, in part:

> "An appeal by the Appellate or Supreme Court shall operate as a supersedeas only if and when the appellant, after entering bond, shall give and file a bond in a Chancery court to secure the appellee party."

So, under the facts in this case it is apparent that an appeal was taken but no supersedeas was granted until the court entered that a supersedeas be granted upon the execution by the defendant of a bond, which was after the date when the order in question was entered. An appeal may be invoked of even though a supersedeas may not be granted, and if that is so it would seem that the court would be without jurisdiction to remove the parties who are appealing, upon the motion of one of the adverse parties. In doing so the court would be depriving the party litigant of the right to appeal, as provided for by law, and since the appeal was pending the court erred in entertaining the motion to remove the defendant John G. Lamberty as guardian ad litem of Charles L. Lamberty, and dismissing the motion.

The defendant contends that the Circuit Court had no jurisdiction to consider the complaint filed by the plaintiffs or issue

the relief prayed for, and urges that it is essential in the creation of a testamentary trust that the testator adequately indicate by the terms of his will his intention to create such a trust by using language sufficient to sever the legal from the equitable estate, and with such certainty as to identify the beneficiaries of the property out of which the trust is to take effect.

When we come to consider the Fourth Paragraph of the last will and testament of Nels John Sandberg, deceased, we find the will provides that the testator conveyed to his insane son, Charles A. Sandberg, his entire property on Carl and Wells Street, Nos. 1-7 Carl Street, in Chicago, and then provides that the testator's sons William and George are to be the trustees of the income which is received from the building and land in question.

While it is true that this provision does not set forth in much detail the purposes of this provision, it is apparent that the testator wished that his insane son should receive the property in question and that the funds derived from this property were to be used for the benefit of this son, and that this fund was to be administered by his sons who are named trustees of this fund.

The court, in the consideration of this question, provided by the decree which was entered that the Trust Company of Chicago, as conservator of the estate of Charles A. Sandberg, incompetent, and as such the owner of the fee, proceed to procure the proper authorization to enter into and execute a lease with Sol Kogen upon the aforesaid rental terms provided for by this proposed lease. The proposed lease provides that $1500 per year is to be paid for the first five years; $1580 per year for the second five years; $1620 per year for the third five years; $1680 per year for the fourth five years, and $1750 per year for the last five years, and it must be considered that by the entry of the decree the court approved of the terms of this lease, for it is further provided

the relief prayed for, and urges that it is unusual in the execution of a testamentary trust that the testator adequately indicate by the terms of his will his intention to create such a trust by using language sufficient to cover the legal from the constitute words, and with such certainty as to identify the beneficiaries of the property out of which the trust is to take effect.

When we come to consider the fourth paragraph of the last will and testament of Nile John Lundberg, deceased, we find the will provides that the testator conveyed to his income son, Martin A. Lundberg, his entire property on Carl and Wells Street, Nos. 1-7 Carl Street, in Chicago, and then provides that the testator's sons William and George are to be the trustees of the income which is received from the building and land in question.

While it is true that this provision does not set forth in such detail the purposes of this provision, it is apparent that the testator wished that his income son should receive the property in question and that the funds derived from this property were to be used for the benefit of his son, and that this trust would be administered by the sons who are named trustees of this trust.

The court, in the construction of this question, provided by the decree which was entered that the trust income of Chicago, as conservator of the estate of Martin A. Lundberg, incompetent, and as such the owner of the fee, proceed to secure the proper authorization to enter into and execute a lease with Del Rogan upon the aforesaid premises, provided for by this proposed lease. The proposed lease provides that $1800 per year is to be paid for the first five years; $1800 per year for the second five years; $1800 per year for the third five years; $1800 per year for the fourth five years, and $1800 per year for the last five years, and it must be considered that by the entry of the decree the court approved of the terms of this lease, for it is further provided

that the Trust Company of Chicago as conservator of the estate of Charles A. Sandberg, incompetent, upon receipt of the said rentals is to turn over the fund to William J. Sandberg and George L. Sandberg, as trustees under the last will and testament of Nels John Sandberg, deceased.

It was the intention of the testator in the execution of this last will and testament to provide a fund to be used for the benefit of Charles A. Sandberg, incompetent, and that, in a measure, is indicated by the fact that the two sons who are to act in the distribution of the fund are not to receive any pay or remuneration for their services.

The general rule is that the words "trust" and trustees," are effective in creating a trust but are not necessary. If the will by its terms as a whole shows a purpose of creating a trust, though no special words are used, it is sufficient, and if it clearly appears from the terms of the document that it was the intention of the testator to create a trust for a lawful purpose and for the management of the estate, such purpose will be approved by the courts.

One of the cases cited in support of this contention is Wimbush v. Wimbush, 253 Ill. 407, where the Supreme Court held that even though the first paragraph of a will, standing alone, vests the widow with an absolute fee, yet if a subsequent paragraph clearly shows that the testator's intention was to create a trust estate for the benefit of the widow and his children, including those of a former wife, the will should be construed as creating such trust estate and not as giving the widow an absolute fee.

When we consider the findings of the court upon the character of the improvement, we find this:

> "The court further finds that by reason of the rapid and extensive growth of the City of Chicago, the change in the character of the neighborhood, and that the building now upon said premises has become an undesirable type of building, and that the physical property itself is in a

> dilapidated and run down condition now occupied by a class of tenants who are unable to pay substantial rents, has become unproductive, and the net income has diminished rapidly; that the gross income for the year ending July 1, 1938, amounted to $1,305, and the net income $677.20."

Then the court, as we have already indicated in this opinion, found the rental to be received for each of the years during the continuance of the term to be fair and reasonable and to the best interest of the estate of Charles A. Sundberg, incompetent. It is to be noted that in the decree the court retained jurisdiction for the purpose of administering the aforesaid trust estate.

Under the circumstances as they appear from this record, the court did not err in entering the decree in question.

Other questions have been raised, but we do not consider them important, and for the reasons stated, the decree is affirmed in part and reversed in part.

DECREE AFFIRMED IN PART AND REVERSED IN PART.

DENIS E. SULLIVAN, P. J. CONCURS
BURKE, J. SPECIALLY CONCURRING:

I agree that the decree should be affirmed. I am of the opinion, however, that the chancellor had the right to remove the person then acting as guardian ad litem and to appoint a successor guardian ad litem in his stead. Furthermore, the chancellor could act until the supersedeas bond was filed. It will be remembered also that the notice of appeal does not (and, of course, could not) assign error as to the removal of the guardian. Apparently, there was no appeal from the order removing the guardian. Hence, the former guardian ad litem is in no position to assign or argue any errors here. The cases he relies on are under the former practice. Then the prosecution of an appeal (as distinguished from a writ of error) was dependent on the approval of a bond within the time limited. Then the case was in the same position as if a supersedeas had been granted. Under the old practice where the litigant sued out a writ of error, he was not

illustrated and are then available now supported by a clear of finding the are media to any substantial proof, for lacked uncertainty, and the may issues the individual monthly; that the owner issues for the year ending July 1, 1966, amounts to $4,750, and the net income $1,[illegible].

Upon the proof, as we have already indicated in this opinion, found the notal to be involved for each of the years during the continuance of the firm to be fair and reasonable and to the best interest of the estate of Charles L. Kaufman, incompetent. It is to be noted that in the issues the court authorized partitioning for the purpose of administering the otherwise that estate.

Under the circumstances as they appear from this record, the court did not err in entering the decree in question.

Other questions have been raised, but we do not consider them important, and for the reasons stated, the decree in attacked is hereby and affirmed in part.

[illegible]
[illegible]

Basil E. Quality, E. L. Stevens
Attys. for appellant Commissioner.

[illegible]

I agree that the decree should be affirmed. I am of the opinion, however, that the commissioner has the right to prove the person from making an question by filing and to consider a number or partial of filing in the court. Furthermore, the commissioner should not grant the necessities that are filed. It will be frequently the case that the notice of appeal does not lead, or where, could not, basis where to be the values or the questions. Significantly, this has an impact from the order overlooking the property. Hence, the former practice of filing is to be positive to assign or state any errors. The notice in point or the order the former practice. That the consideration of an appeal is discretionary (at or after) for determination of the appeal at a time after the court. Then the issue not in the case involves or if a correction has been granted. Under the all

required to file a bond unless he sought a supersedeas. Under the writ of error practice where no supersedeas was granted, the trial court could enforce its decree or judgment. Now, however, under Section 74 of the Civil Practice Act, orders, judgments and decrees in civil cases that were formerly reviewable by writ of error or appeal, are subject to review by notice of appeal. Such review is designated an appeal and constitutes a continuation of the proceeding in the court below. Such appeal under the Civil Practice Act presents to the reviewing court all issues which formerly were presented by appeal and writ of error. In considering cases that are cited and which arose under the old Practice Act, these distinctions must be kept in mind. Until a supersedeas bond is filed, the trial court has a right on a proper showing, within the term, to vacate or modify its orders, judgments and decrees. Even if we consider the point as properly raised, the record does not show that the chancellor abused his discretion. The decree provided that the Circuit Court retain jurisdiction to approve the lease and to administer the trust estate. Therefore, in any event, the jurisdiction of the Circuit Court over the subject matter and the parties, continued.

required to file a bond before he could be a supervisor. Under the writ of error procedure where no supersedeas was granted, the trial court could enforce its decree or judgment. Now, however, under Section 74 of the Civil Practice Act, orders, judgments and decrees in civil cases that were formerly reviewable by writ of error or appeal, are subject to review by notice of appeal. Such review is designated an appeal and constitutes a continuation of the proceeding in the court below. Such appeal under the Civil Practice Act presents to the reviewing court the issues which formerly were presented by appeal and writ of error. In considering cases that are filed and which came under the old Practice Act, these distinctions must be kept in mind. Until a supersedeas bond is filed, the trial court may, in right or a proper showing, within the term, to vacate or modify its orders, judgments and decrees. Even if we consider the point as properly raised, the record does not show that the counsellor abused his discretion. The decree provided that the Circuit Court retain jurisdiction to approve the lease and to administer the trust estate. Therefore, in any event, the jurisdiction of the Circuit Court over the subject matter and the parties, continued.

40804

REAL PACKING CO., a corporation,
Plaintiff-Appellee,

v.

REO PACKING CO., a Corporation, et al.,
Defendants-Appellants.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

305 I.A. 499[2]

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This was an action in equity in the Circuit Court of Cook County by the Real Packing Company, a corporation, against the Reo Packing Company, a corporation, and R. O. Peczulp, its President, seeking to enjoin certain alleged acts of trade-mark and trade name infringement and of alleged unfair business competition and for an accounting of the alleged damages and profits arising therefrom. The case was heard by a master in chancery to whom the cause was referred by the court, who found for the plaintiff. Objections to his report were filed, overruled and stood as exceptions, and the trial court upheld the master and entered a decree as prayed for in the complaint, from which decree the defendants have perfected this appeal.

The facts as they appear in the record are that the plaintiff, Real Packing Company, is an Illinois corporation, engaged in the manufacture and sale of frankfurters and other meat products throughout Chicago and its suburbs. The defendants are Reo Packing Company, an Illinois corporation, similarly engaged, and R. O. Peczulp, its President. Both companies spend large sums in advertising, and in some places, such as South Chicago, Chicago Heights and Roseihill, are competitors. There is a brief outline of the historic background of the two companies, and from the briefs it appears that about the year 1920, the Real Sausage Company (not the plaintiff here) was organized by

various meat dealers, one of whom was H. O. Peczulp, one of the defendants here, who was for many years its president, a member of its Board of Directors, and also the operator of a private meat route distributing its products. It registered as a trade-mark or trade name with the Secretary of State of Illinois a certain device, generally described as a shield, which shield was composed of the various letters making up the words "Real Brand, Real Sausage Co." It sold its products in various types of boxes or containers, one of which, except for the name used on it, was apparently very similar to a container subsequently used by the plaintiff and introduced in evidence at the trial as an exhibit.

About the year 1932, Real Sausage Company went into bankruptcy and certain of its assets were sold to the Real Packing Company, the plaintiff in the present proceedings. Following this bankruptcy and sale, H. O. Peczulp was no longer associated with it or its successor but continued to operate a private meat route as he had been doing for about twenty years, selling his products in similar boxes with vermillion printing with the words "Real and Tasty," and his own initials "H. O. P." H. O. Peczulp testified that about May 1937 he turned over his own sausage business to Reo Packing Company, the other defendant in these proceedings, which he had previously organized and in which he had a controlling interest; that the letters "R. E. O." stood for Retailers' Equality Organization, and its trade-mark was also registered with the Secretary of State of Illinois and contained the words "Retailers' Equity Organization, Reo Packing Co." In the latter part of 1936 and the early months of 1937, the defendant used a box or container which was introduced in evidence at the trial as an exhibit.

The subject of this controversy is whether there was an imitation of the box that was used by the plaintiff as a con-

[illegible] and design, one of them was R. C. Pennell, one of the Defendants here, who was for many years its president, a member of its Board of Directors, and also the operator of a private dust ground distributing its products. It terminated on a trackmark or track near with the operatory of Tract of Illinois a certain device, commonly described as a shield, which shield was composed of the various layers making up the track "dust ground, fuel cinders &c." It said its products in various types of boxes or containers, one of which, except for the same used as it, was apparently very similar to a container commonly used by the plaintiff and introduced in evidence at the trial as an exhibit.

About the year 1927, Coal Cinders Company began its manufacture and operation of its cinders very well in the Coal Products Company, the plaintiff in the present proceeding. Following this manufacture and sale, R. T. Pennell was no longer associated with it or its successor but continued to operate a private dust ground as he had been doing for about twenty years, utilizing the products in similar boxes with verbalities printing with the words "Coal and Tarry," and his own initials "R. C. P." R. C. Pennell testified that about May 1927 he turned over his non-coke business to the Fuelite Company, the other defendant in these proceedings, which he had previously organized and in which he had a controlling interest. Also the defendant C. C. C. sued for Fuelite's inability Corporation, and his trade-mark was also registered with the Secretary of State of Illinois and contained the words "Fuelite Quality Corporation, Tar Product Co." In the latter part of 1928 and the early months of 1927, the defendant used a box or container which was introduced in evidence at the trial as an exhibit.

The subject of this controversy is whether there was in existence of the box that was used by the plaintiff or a con-

tainer for its food products, and it appears that in November, 1936, plaintiff's attorneys wrote to the Reo Packing Company to desist using the trade-mark and trade name of "Real" and the design on the packing boxes. The Reo then advised the plaintiff that it had two months' supply of boxes on hand and that it would not imitate the label, trade-mark, design and form of advertising being used by the plaintiff. Subsequently, on December 19th and 24th similar letters were sent to Reo by the plaintiff, in which the attention of the defendant, Reo Packing Company, was called to the use by the defendant of the trade-mark and trade name "Real" and the design on the packing boxes that were used by the plaintiff in this action. On December 7, 1937, these proceedings were instituted by the plaintiff, which sought an injunction and an accounting of profits and damages. As we have already indicated, the matter was heard by a master in chancery, and the trial court upheld the report of the master and entered the decree from which this appeal was taken.

At the hearings before the master considerable testimony was taken. The testimony relating to the historic background of the two companies is set forth above and will not be further reviewed here. The testimony relating to subsequent events is reviewed here, not with reference to its order of presentation, but with reference to the chronological sequence of the events thereby related.

The court in its decree perpetually enjoined the defendants from the use of the words "Real Frankfurters" and "Real Packing Company," apparently upon the basic premise, which the defendants state they will subsequently show is contrary to the authorities, that the plaintiff had secured some sort of an exclusive right to the use of the descriptive word "Real," and the defendants cite in support of their theory the case of Candee, Swan & Co. v. Deere & Co., 54 Ill. 439. The plaintiff, Deere & Co.,

Saints for its tea products, and it appears that in November, 1888, plaintiff's attorney wrote to the firm (Young Jensen & Co.) that the trade-mark and words used of "Tea" and the design on the packing boxes. The firm then advised the plaintiff that it had two months' supply of boxes on hand and that it would not initiate the label, trade-mark, design and form of advertising being used by the plaintiff. Subsequently, on December 18th and 20th similar letters were sent to Lee by the plaintiff, in which the attention of the defendant, Lee Packing Company, was called to the use by the defendant of the trade-mark and trade name "Tea" and the design on the packing boxes that were used by the plaintiff in this action. On December 7, 1887, these proceedings were instituted by the plaintiff, which sought an injunction and an accounting of profits and damages. As we have already indicated, the matter was heard by a master in chancery, and the trial court upheld the report of the master and entered the decree from which this appeal was taken.

At the hearing before the master substantial testimony was taken. The testimony relating to the material legal issues of the two companies is set forth above and will not be further reviewed here. The testimony relating to subsequent events is reviewed here, not with reference to its order of presentation, but with reference to the chronological sequence of the events thereby related.

The court in its decree respectively enjoined the defendants from the use of the words "Tea Importers" and "Tea Packing Company," separately upon the basis presumed, which the defendants state they will subsequently show in contrary to the substantial, that the plaintiff had neither such sort of or exclusive right to the use of the descriptive word "Tea," and the defendants site in support of their theory the case of Langdon, Dunn & Co. v. Dates & Co., 96 Fed. 499. The plaintiff, Dates & Co.,

had for some eighteen years, manufactured and sold plows which it had stenciled on the handles "Deere & Co." in a circular line, with "Moline, Illinois" stenciled underneath in a straight line. It had also advertised its plows by circular, catalogue, etc. for many years as the "Moline Plow". At the trial the court entered a decree finding for the plaintiffs and that the plaintiffs were entitled to the exclusive use, as a trade-mark, in the manufacture and sale of plows, of the words "Moline Plow," together with other characters and figures which the court held were used by the plaintiff in its business.

The Supreme Court in its opinion written by Mr. Justice Hesse, reversed the decree dissolving the injunction and dismissing the suit, and in speaking of the right to use words, marks or other devices, the court interpreting the words that were used, said:

> "There is, obviously, no good reason why one person should have any better right to use them than another. They may be used by many different persons, at the same time, in their brands, marks or labels on their respective goods, with perfect truth and fairness. They signify nothing, when fairly interpreted, by which any dealer in a similar article would be defrauded."

and the defendants upon this general question cite the case of Bolancer v. Peterson, 136 Ill. 215.

The plaintiff's reply to the contention of the defendants is that defendants' argument is apparently based upon the theory that if defendants can cloak themselves with the subterfuge of a phrase known as "descriptive words," they will be free to engage in any and all acts of imitation and unfair competition and plaintiff is without a remedy to protect itself from the unfair practice of these defendants. And further answering call this Court's attention to the position assumed by the defendants as being contrary to the authorities applicable to the case at bar, for under the law and under the facts the plaintiff has the right to have its name and label protected from the imitation and unfair competition

had for some eighteen years, manufactured and sold gloves which it had stenciled on the handles "Here's a Go," in a circular line, with "Spine, Filmite" stenciled underneath in a straight line. It had also distributed its gloves by circulars, catalogues, etc. for many years as the "Spine Glov". At the trial the court ordered a decree finding for the plaintiffs and that the plaintiffs were entitled to the exclusive use, as a trade-mark, in the manufacture and sale of gloves, of the words "Spine Glov," together with other characters and figures which the court held were used by the plaintiff in its business.

The Supreme Court in its opinion written by Mr. Justice Brewer, reversed the decree dismissing the injunction and dismissing the suit, and in question of the right to use words, marks or other devices, the court instructing the words that were used, said:

> "There is, obviously, no good reason why one person should have any better right to use them than another. They may be used by any different persons, at the same time. In trade marks, they are labels on their respective goods, with distinct trade and firmness. They simply notching, when fitting hereunto, by which any dealer in a similar article would be distinguished."

and the defend are upon this general question also the case of Delaware v. Pillsbury, 172 Ill. 192.

The plaintiff's reply to the contention of the defendants in that defendants' argument is apparently based upon the theory that if defendants can close themselves with the substitute of a phrase known as "Spectrity words," they will be free to engage in any and all acts of infringing and unfair competition and plaintiff is without a remedy to protect itself from the unfair practice of these defendants. And further maintaining all this Court's attention to the position assumed by the defendants as being unfair to the competition applicable to the case at bar, for under the law and under the facts the plaintiff has the right to have its name and label protected from the infringing and unfair competition

of these defendants, and cites the case of O'Cedar Corp. v. S. S. Kresge Co., 259 Ill. App. 396, where this court said:

> "Moreover, even if the words could properly be considered as as descriptive, that fact would not justify the deceptive use by others of the words, or similar ones, in unfair trade competition where confusion in the minds of purchasers would result. In Delany Hock & Eye Co. v. Union Hairpin Mfg. Co., 297 Ill. 358, 365, it is said: 'Where a manufacturer or merchant has used a mark, word or phrase in such a way that it has become identified with his business and the articles of his manufacture, another will not be permitted to use the same mark, word or phrase so as to lead purchasers to believe they are buying the goods of the former. This rule applies even though the word, name or phrase under which the reputation of the merchant or manufacturer has been acquired is * * * merely descriptive of the character or quality of the articles * * *. The question is one of common honesty, and the courts require the observance of such a standard as will protect the business, the market and the reputation of a dealer against all acts which tend to deceive the public into believing that the goods of another are his goods and to pass them off as such. A merely descriptive term * * * may have become so associated with a particular kind of goods or the product of a particular manufacturer in such a way that merely attaching the word to an article of the same kind would amount to a misrepresentation as to the origin of the article.'"

and it appears from the suggestion offered by the plaintiff that the defendants concede that the name "Real Frankfurters" is used to denote the particular frankfurters of this complainant; and that the defendants further concede that plaintiff has used the name "Real" continuously for a period of more than nineteen years to identify its products, and that this name has become so attached to the goods of the plaintiff that when the name "Real" is applied the goods are identified as the products of the plaintiff, and that the defendants further concede the following to be true in their answer to the plaintiff:

> "(6) That by reason of the long experience and great care of the plaintiff in its said business, and the good quality of said 'Real Frankfurters' and 'Real Sausages,' the same have become widely known in the community; * * * and that said product has acquired a high reputation * * *"
>
> "(7) That said product is known to the public and to the buyers and consumers thereof, by the names of

of these defendants, one side, the case of *Pfister Inc.* v. *Ill. Pharm. Co.*, 288 Ill. App. 388, where this court held:

"However, even if the words could reasonably be considered as descriptive, that fact would not justify the deceptive use by others of the words, or similar ones, in unfair trade competition where confusion in the minds of purchasers would result. In Lehman Bros. v. Schmitt, 173 Ill. App. 547, 551, 552, it is said: 'Even a descriptive or non-descriptive word may, and as about it such a very high in the common identification of the goods and the exclusion of the monopoly, another will not be permitted to use the same word, mark or device so as to lead purchasers to believe they are buying the goods of the former. This rule applies even though the word, name or device under which the competition of the manufacturer has been carried is '' '' merely descriptive of the character or quality of the articles ' ' '. The question is one of common honesty, and the courts require the observance of such a standard in will respect the same laws, the motive and the propriety of a decision against all acts which tend to divert the public into believing that the goods of another are his goods and to gain thus at or such. A merely descriptive term " " ' may have become so associated with a particular kind of goods or the product of a particular manufacturer in such a way that their use attaches the mark to an article of the same kind manufactured by another in the origin of the article.'"

and it appears from the evidence offered by the plaintiff that the defendants contend that the name "Ideal Pharmacies" is used to denote the particular Pharmacies of this complainant; and that the defendants further contend that plaintiff has used the name "Ideal" continuously for a period of more than eighteen years to identify its products, and that this name has become so attached to the goods of the plaintiff that when the name "Ideal" is applied the goods are identified as the products of the plaintiff, and that the defendants further contends the following to be true in their answer to the plaintiff:

"(5) That by reason of the long experience and great care of the plaintiff in its mail business, and the good quality of mail Ideal Pharmacies' and 'Ideal Remedies', the same have become widely known in the community, ' ' ' and that mail product has received a high reputation ' ' '.

"(7) That mail product is known to the public and to the buyers and consumers thereof, by the name of

> 'Real Frankfurters' and 'Real Sausages', and by the plaintiff's own proper containers, labels, trademark and trade name as shown by 'Exhibit A' hereto attached."

So that it would seem, in a measure, that the defendants have admitted the use by the plaintiff of the words that are the subject of this controversy, and further, in the case of International Committee of Young Women's Christian Assn. v. Young Women's Christian Assn., 194 Ill. 194, the court upon a like question said:

> "While it is true that generic terms or mere descriptive words are the common property of the public and not ordinarily susceptible of appropriation by an individual, the fact will not prevent the issuing of an injunction to restrain the use of such terms and words at the suit of one who has already adopted them, where the evidence shows a fraudulent design and that the public will be misled."

The Court's attention has been called to the opinion of the Supreme Court in the case of The Mount Hope Cemetery Assn. v. The New Mount Hope Cemetery Assn., 246 Ill. 416, wherein the court approved an injunction to restrain the defendant from using the name "The New Mount Hope Cemetery Association," the same infringing upon the name of "The Mount Hope Cemetery Association." And in the case of Auto Parts Company v. Silverstein, et al., 211 Ill. App. 436, this court held the name Auto Parts and Sales Company to constitute unfair competition to the complainant Auto Parts Company, although both names are purely descriptive. There the court said:

> "While names which are generic terms or merely descriptive are the common property of the public, and a private property interest therein cannot be acquired, nevertheless, the courts will grant relief where a name of this kind has been adopted under circumstances which make it appear that the purpose of adopting such name was to mislead the general public. International Com. Y.M.C.A. v. Y.M.C.A., 194 Ill. 194, The Mount Hope Cemetery Assn. v. The New Mount Hope Cemetery Assn. 246 Ill. 416. One cannot use even his own name in such a manner as to deceive. Allegretti et al. v. Allegretti Chocolate Cream Company, 177 Ill. 139."

We gather from the authorities that have been submitted the rule is that generic terms or descriptive words are the common property of the public. Nevertheless, where the generic terms or descriptive words are used and are adopted to mislead the general public and such appears from the evidence, the court

> "Leaf Distributors' and 'Leaf Company', and by the plaintiff's own proper combination, labels, trademark and type name as shown by 'Exhibit A' hereto attached."

So that it would seem, in a measure, that the defendants have admitted the use by the plaintiff of the words that are the subject of this controversy, and further, in the case of International Committee of Young Women's Christian Assn. v. Young Women's Christian Assn., 194 Ill. 194, the court upon a like question said:

> "While it is true that generic terms or mere descriptive words are the common property of the public and not ordinarily susceptible of appropriation by an individual, that fact will not prevent the issuing of an injunction to restrain the use of such terms and words at the suit of one who has already adopted them, where the evidence shows a fraudulent design and that the public will be misled."

The Court's attention has been called to the opinion of the Supreme Court in the case of The Mount Hope Cemetery Assn. v. The New Mount Hope Cemetery Assn., 246 Ill. 416, wherein the court granted an injunction to restrain the defendant from using the name "The New Mount Hope Cemetery Association," the name infringing upon the name of "The Mount Hope Cemetery Association." And in the case of Auto Parts Company v. Wilenstein, et al., 221 Ill. App. 420, this court held the name Auto Parts and Sales Company to constitute unfair competition to the complainant Auto Parts Company, although both names are purely descriptive. There the court said:

> "While names which are generic terms or merely descriptive are the common property of the public, and a valuable property interest therein cannot be acquired, nevertheless, the courts will grant relief where a name of this kind has been adopted under circumstances which make it appear that the purpose of adopting such name was to mislead the general public. International Com. Y.W.C.A. v. Y.W.C.A., 194 Ill. 194, The Mount Hope Cemetery Assn. v. The New Mount Hope Cemetery Assn., 246 Ill. 416. The [illegible] were [illegible] in such a manner as to deceive. [illegible] et al. v. [illegible] Company, [illegible] Ill. [illegible]."

We gather from the authorities that have been submitted the rule is that generic terms or descriptive words are the common property of the public. Nevertheless, where the generic terms or descriptive words are used and are adopted to mislead

would be justified in entering an order restraining the defendant in a proper case from using the words that are general in character and used for the purpose of deceiving the public.

There is a further case that has a bearing upon the question before this court, and that is the case of Royal Baking Powder Company v. Raymond, 70 Fed. 376. The court in affirming the order enjoining the defendant from using the word "Royal" said:

> "The word 'Royal' is not descriptive of baking powder. * * * said word is, in fact, used as a mark to indicate the origin of the goods made by this complainant."

And when we come to consider the authorities, as well as the character of the words used, we are of the opinion that the court did not err in entering the decree, where it was for the purpose of protecting the Real Packing Company from imitation and wilful acts of unfair competition by these defendants. The question is largely dependent upon the purpose for which these words were used.

It is the contention of the defendants that in the case at bar the defendants had in good faith irrevocably abandoned the use of the sausage container known as Plaintiff's Exhibit "B" long before suit was brought and had been distributing its products exclusively in its green and white cherry brand box.

Evidence was offered by the defendants to the effect that this exhibit was used only in connection with the sale of sausages from sometime in the latter part of 1936 up until May, 1937, when the green and white cherry brand box came out, which abandonment occurred approximately six months before these proceedings were instituted in December 1937. However, it appears from the evidence of the plaintiff that notwithstanding this promise the defendants continued to sell frankfurters under the simulated label - Plaintiff's Exhibit B. There is evidence that after May, 1937 the defendants

would be justified in entering an order restraining the defendant in a proper case from using the words that are personal to deceptive and used for the purpose of deceiving the public.

There is a further case that has a bearing upon the situation before this court, and that is the case of Royal Baking Powder Company v. Raymond, 76 Ind. 270. The court in affirming the order enjoining the defendants from using the word "Royal", said:

> "The word 'royal' is not descriptive or indicative. * * * It is the word it, it that, used as a mark to indicate the origin of the goods made by this complainant."

And when we come to consider the authorities, as well as the character of the words used, we are of the opinion that the court did not err in enjoining the defendants, where it was for the purpose of protecting the Real Product Company from imitation and unfair acts of unfair competition by these defendants. The question is largely dependent upon the purpose for which these words were used.

It is the contention of the defendants that in the case at bar the defendants had in good faith innocently abandoned the use of the message switchboard upon at Plaintiff's exhibit "2" long before suit was brought and had been distributing its products exclusively in the green and white cherry tuned box.

Evidence was offered by the defendants to the effect that this exhibit was used only in connection with the sale of beverages from counters in the latter part of 1922 up until May, 1927, when the green and white cherry tuned box came out, which abandonment occurred approximately six months before these proceedings were instituted in December 1927. However, it appears from the evidence of the plaintiff that notwithstanding this promise the defendants continued to sell frankfurters under the simulated label - Plaintiff's exhibit 3. There is evidence that after May, 1927 the defendants

sold a cheaper grade of frankfurters under the imitation label of the plaintiff. There is also evidence that in November and December, 1937 a witness saw frankfurters being sold in the retail stores under the imitation label of the plaintiff, and the witness testified that he saw at the Reo Packing Company about 50 boxes already packed on top of the racks in the cooler; that these frankfurters were 15 cents a pound, while the better grade was 19 cents a pound, and there is also the admission by the defendants that on or about November 27, 1937, the Reo Packing Company was using the plaintiff's label.

These proceedings were instituted on December 7, 1937 to enjoin the defendants from further acts of unfair competition, and there is evidence that subsequently in February 25, 1938 the imitation label of the plaintiff was seen in retail stores. The defendant, R. C. Rosmulp, testified that they ceased using the box about the end of March, 1938, because his attorney had made an agreement with the attorney for the plaintiff to that effect.

So, when we consider all the evidence that has been presented by both sides it appears that the question is a controverted one and that there was sufficient evidence to justify the court in entering the decree in question.

There was evidence as to whether or not the names Real and Reo were confusing. That also was a question of fact, together with the question as to how the mail was treated when it was misdirected to the defendants. Taking the case all in all the evidence upon which the court passed was sufficient to sustain the decree upon that question.

The plaintiff suggests with somewhat surprise as to the defendants' contention, which is raised for the first time in this court, that the evidence discloses an abandonment of plaintiff's label, and calls this Court's attention to the fact

nail a cheaper grade of tranquilizers under the imitation label of the plaintiff. There is also evidence that in November and December, 1957 a witness saw tranquilizers being sold in the regular stores under the imitation label of the plaintiff, and the witness testified that he saw at the top packing company about 20 boxes already packed or ready to be packed in the cooler; that these tranquilizers were 12 cents a pound, while the better grade was 19 cents a pound, and there is also the admission by the defendants that up to about November 27, 1957, the top packing company was using the plaintiff's label.

These proceedings were instituted on January 7, 1958 to enjoin the defendants from further acts of unfair competition, and there is evidence that subsequently on February 10, 1958 the imitation label of the plaintiff was seen in several stores. The defendant, W. A. Toomey, testified that they ceased using the box about the end of March, 1958, because his attorney had made an agreement with the attorney for the plaintiff to that effect.

We, when we consider all the evidence that has been presented by both sides it appears that the question is a controverted one and that there was sufficient evidence to justify the court in enjoining the device in question.

There was evidence as to whether or not the names Neal and Ho were confusing. That also was a question of fact, together with the question as to how the mail was treated when it was misdirected to the defendants. Taking the case as in all the evidence upon which the court passed was sufficient to justify the decree upon that question.

The plaintiff objects with somewhat merit as to the defendants' contention, which is raised for the first time in this court, that the evidence disclosed no abandonment of plaintiff's label, but while this Court's opinion in the case

that there is no evidence in the record upon that question. The answer to that is, the defendants did state in their briefs that there was an abandonment, which is in effect an admission that they had been using the plaintiff's label, so that as we gather from the record, the defendants seek to avoid the decree that was entered in this case by the statement that they really had abandoned the use of the label. However, there is evidence that the defendants continued to use it. That is even admitted by the defendant E. G. Foesulp, and under the circumstances there is no occasion to further answer that suggestion, except to point to the record.

Under the circumstances the plaintiff is entitled to an accounting of profits and damages, if any, arising out of the imitation of its label by the defendants, and it was for the court to determine the question from the facts, which it did and directed that an accounting of profits and damages be taken, and nothing has been called to our attention which would justify a reversal of the decree upon that ground.

For the reasons stated in the opinion the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P. J.
BURKE, J. CONCUR.

that there is no evidence in the record upon that question. The answer to that is, the defendants did state in their briefs that there was no demurrer, which is in effect an admission that they had been making the plaintiff's label, so that as an matter from the record, the defendants seek to avoid the issues that was entered in this case by the statement that they really had abandoned the use of the label. However, there is evidence that the defendants continued to use it. That is even admitted by the defendant v. c. Lemmig, and under the circumstances there is no occasion to further answer that assertion, except to point to the record.

Under the circumstances the plaintiff is entitled to an accounting of profits and damages, if any, arising out of the imitation of its label by the defendants, and it was for the court to determine the question from the facts, which it did and directed that an accounting of profits and damages be taken, and nothing has been relied by the objection which would justify a reversal of the decree upon that ground.

For the reasons stated in the opinion the decree is affirmed.

ORDERED AFFIRMED.

BEGG J., CONCURS IN R.
LUCAS J., DISSENTS.

41070

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

CLARENCE WALKER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

305 I.A. 500

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This appeal by the defendant is from a judgment of guilty in a criminal action, wherein on June 20, 1939, an information was filed in the office of the clerk of the Municipal Court of the City of Chicago, signed by one, Arthur Garaher, and tried by the court, jury having been waived, in the Municipal Court of Chicago. By the judgment, the defendant was sentenced to the House of Correction for one year and to pay a fine of one ($1.00) Dollar.

The trial of the defendant was on an information filed in the office of the clerk of the Municipal Court of Chicago, and signed and sworn to by one, Arthur Garaher. This information charged that the defendant on the 23rd day of June, 1939, at the City of Chicago, did unlawfully, knowingly, and wilfully encourage one William Reed, a male person under the age of eighteen years of age, to-wit, sixteen years, to become a delinquent child, and did then and there, unlawfully *** do acts which directly produced *** and which tended to render the said William Reed to be or become a delinquent child, in that he, the said Clarence Walker, did then and there expose his person to the said William Reed contrary to the form of the Statute.

In considering this appeal, the evidence that was heard by the trial court is not in the record, so that we will assume that there was evidence to justify the Court's action provided there was a sufficient criminal charge to justify the court in entering the judgment in question.

The defendant did not object on the trial of this action to the information as to form or substance until on the 2nd day of October, 1939. He then moved the court to expunge the order and judgment entered

in the case on the 19th day of June, 1939, for the following reasons;

Among other objections he complains that the complaint states no cause of action or offense against the people of the State of Illinois, and further that under the statutes of the State of Illinois, the acts constituting the crime of delinquency are specially defined, and that the court was without jurisdiction in the above mentioned matter to enter the sentence imposed on the defendant. This motion of the defendant was denied, so that the question arises as to the sufficiency of the information in that it fails to charge a crime in the language and terms of the statute, and that the court was in error when it entered the judgment.

Under the statutes in question it is necessary that there be a charge that the defendant wrongfully and unlawfully contributed to conditions that rendered the child delinquent, in that the defendant did then and there take and expose his person in the manner of the complaint.

One of the cases of this court that has passed upon a like question is the case of the People of the State of Illinois v. Robert Wallace, 185 Ill. App. 213, in which this court said "the judgment is sought to be reversed upon assignments that error was committed by the court in overruling the motion of the defendant to quash the information, and also the motion in arrest of judgment." The court further said that Robert Wallace, on February 18, 1932, as charged in the complaint did

> "unlawfully, wilfully and knowingly encourage, aid, cause, abet and connive at the delinquency of one Dorothy Rochenbusch, a minor female child under the age of 18 years, to-wit, 16 years,"

The Court further says:

> "that portion of the information ending with the words, '16 years', charges a crime in the language of the statute. The remaining portion should be regarded as surplusage. In our opinion 'the nature of the offense', as set forth, 'may be easily understood,' and section 6 of division II of the Criminal Code applies."

In addition to the case just quoted, there has been called to the attention of this court, the case of People v. Joseph Hamilton, 283 Ill. App. 641, and in this case the court held that the information

in the case on the 29th day of June, 1979, for the following reasons:

Among other objections he contends that the complaint states no cause of action or offense against the people of the state of Illinois, and further that under the statutes of the state of Illinois, the acts constituting the crime of delinquency are specially defined, and that the court was without jurisdiction in the above mentioned matter to enter the sentence imposed on the defendant. This motion of the defendant was denied, so that the question arises as to the sufficiency of the information in that it fails to charge a crime in the language and terms of the statute, and that the court was in error when it entered the judgment.

Under the statutes in question it is necessary that there be a charge that the defendant wrongfully and unlawfully contributed to conditions that rendered the child delinquent, in that the defendant did then and there take and expose his person in the manner of the complaint.

One of the cases of this court that has passed upon a like question in the case of the People of the State of Illinois v. Robert Williams, 383 Ill. App. 212, in which this court held "the judgment is sought to be reversed upon assignments that error was committed by the court in overruling the motion of the defendant to quash the information, and also the motion in arrest of judgment." The court further said that Robert Williams, on February 18, 1937, as charged in the complaints did "unlawfully, wilfully and knowingly contribute, aid, cause, that and conduce to the delinquency of the juvenile defendants, a minor female child under the age of 18 years, namely, to wit:

the court further says:

"that portion of the information dealing with the words, 'in fact', charges a crime in the language of the statute. The charging portion should be supported by sufficiency. In our opinion 'the actual of the offense', or any fact, 'may be easily understood,' and serves a of citation if of the criminal code applies."

In addition to the case just quoted, there has been called to the attention of this court, the case of People v. Jacob Hamilton, 383 Ill. App. 641, and in this case the court held that the information

charge was in the language of the statute. The information there charged that the defendant

> "did unlawfully, knowingly and wilfully encourage Audrey and Shirley Ulrich, a female person under the age of 18 years, to-wit, 9 years and 8 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Audrey and Shirley Ulrich to be or to become a delinquent child in that he, the said Joseph Hamilton did take indecent liberties with the said Audrey and Shirley Ulrich in his candy store located at 2004 Wabansia and cause the said Audrey and Shirley Ulrich to commit indecent and lascivious acts, contrary to the form of the statute..."

Further in its opinion, the court said that

> "the information is sufficient which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood. People v. Santura, 238 Ill. 513; Strohm v. People, 160 Ill. 582; Loehr v. People, 132 Ill. 504; Sandord v. People, 121 Ill. 633; Fuller v. People, 92 Ill. 182; People v. Wallace, 188 Ill. App. 213. The information was substantially in the language of the statute and entirely sufficient to notify the defendant of the nature of the offense with which he was charged."

Under the provisions of the Statute, provided for in Par. 104, sec. 2, entitled "Criminal Code," Smith-Hurd Rev. Stat. 1935, and especially from the provisions that

> "Any person who shall knowingly or wilfully cause and or encourage any male under the age of seventeen (17) years or any female under the age of eighteen (18) years to be or to become a delinquent child as defined in section one (1) *** shall be guilty of the crime of contributing to the delinquency of children,..."

especially when it is provided in par. 103, sec. 1,

> "or inducing or encouraging the use of vile, obscene, vulgar, profane or indecent language in any public place or about any school house; or is guilty of indecent or lascivious conduct."

The defendant calls the court's attention to the fact that this information does not specifically charge or allege any offense which would come within Chapter 38, Section 100, of the Illinois State Bar Association Statute, Smith-Hurd, Chapter 38, Section 104, and that the information charges that he exposed his person to said William Reed, which act would not necessarily be a criminal offense in the absence of additional circumstances not alleged in the information. However, while there is no authority of a court of last resort in this state, having passed on a like question, in the case of People v. Kretz, 230 Mich. 334,

the court in its opinion said:

> "The well settled and generally known significance of the phrase 'indecent and obscene exposure of the person' is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others."

The evidence not having been preserved in the record before this court, we will presume that there was sufficient evidence to justify the court in entering the judgment. We believe that upon the record before this court, the court did not err in finding the defendant guilty and fixing the punishment.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J., and
BURKE, J, CONCUR.

The Court in its opinion said:

"The well settled and generally known significance of the phrase 'interest and charge incident to the period which intervenes between the date of the judgment rendered in the trial court and the date of the judgment of the appellate court.' Cases cited in this opinion of course.

The evidence not having been presented to the trial Judge this court, in all probabilities that there was sufficient evidence to justify the Judge in entering the judgment. We believe that upon the record before this court, the court did not err in vacating the judgment and filing the judgment.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

Smith, P. Jones, Jr., and
Brown, J., concur.

41200

FRED KEMPER,

Plaintiff - Appellee,

v.

HARRY COHEN, SYRUS W. OLSON and ETHEL S. OLSON, his wife, THOMAS J. KEYE, as Trustee Under the Trust Deed Recorded as Document No. 10155[illegible], NELS N. VIERUP, as Receiver in Cause No. 533812, Superior Court of Cook County, Illinois, and "UNKNOWN OWNERS",

Defendants,

On Appeal of HARRY COHEN,

Defendant - Appellant.

INTERLOCUTORY APPEAL

SUPERIOR COURT

COOK COUNTY.

305 I.A. 501

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an interlocutory order entered on January 25, 1940, on plaintiff's verified petition filed in a suit to foreclose a junior trust deed and asking for the appointment of a receiver for the premises described in the plaintiff's complaint. To this petition, defendant, Harry Cohen, the owner of the equity of redemption filed a verified answer. From all allegations in the complaint, it appears that the plaintiff is the owner of a junior mortgage securing an indebtedness in the principal sum of Fourteen Thousand Five Hundred ($14,500.00) Dollars, the unpaid balance of which is in the sum of Thirteen Thousand Nine Hundred ($13,900.00) Dollars and became entirely due on November 1, 1931. When plaintiff filed his complaint to foreclose the mortgage in this case, interest had accrued on said principal balance to the extent of Eleven Thousand Five Hundred Fifty and 78/100 ($11,550.78) Dollars, thus aggregating a total indebtedness of Twenty Five Thousand Four Hundred Fifty and 78/100 ($25,450.78) Dollars. A first mortgage encumbering the premises had been foreclosed and a decree of foreclosure and sale was entered by the court, pursuant to which sale was had on October 25, 1938, for Twenty One Thousand($21,000.00) Dollars. On October 25, 1939, plaintiff redeemed from said sale and paid the Master in Chancery who made the sale the sum of Twenty Four Thousand Nine Hundred Sixty

COOK COUNTY,

PLAINTIFF - APPELLEE,

V.

LARRY COHEN, ETHEL M. COHEN AND
DENNIS O. COHEN, ATTORNEYS,
1. COHEN, AS TRUSTEE UNDER THE TERMS
OF A CERTAIN TRUST AGREEMENT DATED
MAY 2, 1[illegible], AS TRUSTEE,
DEFENDANTS - APPELLANTS.



MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant from an interlocutory order entered on February 28, 1960, on plaintiff's verified petition filed in a suit to foreclose a junior trust deed and asking for the appointment of a receiver for the premises described in the plaintiff's complaint. To this petition, defendant, Larry Cohen, the owner of the equity of redemption filed a verified answer. From all allegations in the complaint, it appears that the plaintiff is the owner of a junior mortgage securing an indebtedness in the principal sum of Fourteen Thousand Five Hundred ($14,500.00) Dollars, the unpaid balance of which is in the sum of Thirteen Thousand Five Hundred ($13,500.00) Dollars and became entirely due on November 1, 1961. When plaintiff filed his complaint to foreclose the mortgage in this case, interest had accrued on said principal balance to the extent of Eleven Thousand Five Hundred Fifty and 75\100 ($11,550.75) Dollars, thus aggregating a total indebtedness of Twenty Five Thousand Four Hundred Fifty and 75\100 ($25,450.75) Dollars. A first mortgage encumbering the premises had been foreclosed and a decree of foreclosure and sale was entered by the court, pursuant to which sale was had on October 25, 1956, for Twenty One Thousand($21,000.00) Dollars. On October 25, 1959, plaintiff redeemed from said sale and paid the master in Chancery who made the sale the sum of Twenty Four Thousand Nine Hundred Sixty

Six and 40/100 ($14,300.40) Dollars, and received a certificate of redemption.

By his foreclosure, plaintiff seeks in addition to other relief to add the monies expended for redemption to the mortgage indebtedness, the subject of this foreclosure proceedings, which makes a total indebtedness of Fifty Thousand Four Hundred Seventeen and 18/100 ($50,417.18) Dollars.

Cyrus B. Olson and Ethel D. Olson were makers of both mortgages and conveyed the premises in 1928 to a Trustee to secure the payments of amounts due under the mortgages, and, thereafter, did not appear in the chain of title.

Harry Cohen, the defendant, acquired title on December 5, 1939, forty days after the owners right to redeem from the sale under the first mortgage foreclosure had expired.

On January 12, 1940, plaintiff applied to the court for the appointment of a Receiver based upon his verified petition in conjunction with the complaint. The 15 month statutory period of redemption from the sale provided for in the decree in the prior foreclosure case, was to expire on January 30, 1940, and the Receiver in possession of the premises by virtue of the prior proceedings was entitled to retain possession until that time. Plaintiff's action was continued until that time, at which time the defendant, without previously giving notice to the plaintiff, filed an Answer to plaintiff's petition, no Answer having at that time been filed to the complaint.

Plaintiff's verified petition alleges among other things that Cyrus B. Olson and Ethel D. Olson, makers of the trust deed and mortgage are insolvent and without personal means to pay or satisfy the indebtedness due plaintiff; that they are no longer the owners of the equity of redemption and do not reside on the premises; that Harry Cohen is the present owner and does not reside on the premises and that petitioner does not have any knowledge of his present whereabouts.

six and 40/100 ($64,386.40) dollars, and received a certificate of redemption.

By his foreclosure, plaintiff seeks in addition to other relief to add the amount expended for redemption to the mortgage indebtedness, the subject of this foreclosure proceeding, which makes a total indebtedness of fifty thousand four hundred seventeen and 14/100 ($50,417.14) dollars.

Cyrus H. Olson and Ethel H. Olson were makers of both mortgages and conveyed the premises in 1929 to a trustee to secure the payments of amounts due under the mortgages, and, thereafter, did not appear in the chain of title.

Every person, the defendant, claiming title as Grantee H, 1929, forty days after the owners right to redeem from the sale under the first mortgage foreclosure had expired.

On January 12, 1940, plaintiff applied to the court for the appointment of a Receiver based upon his verified petition in conformity with the mandate. The 12 month statutory period of redemption from the sale provided for in the decree in the prior foreclosure case, was to expire on January 22, 1940, and the Receiver in possession of the premises by virtue of the prior proceedings was entitled to retain possession until that time. Plaintiff's motion was continued until that time, at which time the defendant, without previously giving notice to the plaintiff, filed an answer to plaintiff's petition, no answer having at that time been filed to the complaint.

Plaintiff's verified petition alleges among other things that Cyrus H. Olson and Ethel H. Olson, makers of the trust deed and mortgage are insolvent and without personal means to pay or satisfy the indebtedness due plaintiff; that they are in danger the period of the equity of redemption and do not reside on the premises; that Ethel Olson is the present owner and does not reside on the premises and that petitioner does not have any knowledge of his present whereabouts.

On January 25, 1940, the defendant, Harry Cohen, by leave of court, filed his Answer to said Petition, which denied that there was due plaintiff the sum of Twenty Five Thousand Four Hundred Fifty and 78/100 ($25,450.78) Dollars, on said junior trust deed sought to be foreclosed; that said trust deed and notes were delivered to one, Gustave G. Anderson, in consideration for money due him for erecting the building on premises described in the complaint for Cyrus B. Olson; that subsequently, Olson defaulted in payment of notes and entered into an agreement with Anderson whereby Olson and his wife would convey premises to Anderson, in consideration thereof, Anderson would cancel the trust deed and notes sought to be foreclosed herein; that pursuant to the agreement, Cyrus B. Olson and Ethel Olson conveyed the premises to Gustave Anderson on March 29, 1939, which deed was recorded as document No. 10334193, and was in full payment and satisfaction of indebtedness and notes and trust deed representing same and that thereby the lien of the trust deed became extinguished and merged with the fee of premises; that by reason of said merger there is nothing due to plaintiff under said trust deed and notes; that plaintiff is barred from maintaining the present action to foreclose said trust deed.

The answer of the defendant admits that on October 25, 1939, plaintiff paid Master Lantry Twenty Four Thousand Nine Hundred Sixty Six and 40/100 ($24,966.40) Dollars, and that said Master issued a certificate of redemption, and the defendant denies that plaintiff is entitled to recover Twenty Four Thousand Nine Hundred Sixty Six and 40/100 ($24,966.40) Dollars, as an advancement under said trust deed and denies that there is due plaintiff the sum of Fifty Thousand Four Hundred Seventeen and 18/100 ($50,417.18) Dollars, or that the trust deed is a lien on the property described.

It further appears from the Answer that the premises are on the northwest corner of Wellington and Central Avenues, Chicago, and are improved with a three story brick building, containing 18 apartments

On January 22, 1942, the defendant, Harry Hobson, by leave of court, filed his answer to said petition, which denied that there was due plaintiff the sum of twenty five thousand four hundred fifty and 78/100 ($25,450.78) dollars, on said junior trust deed sought to be foreclosed; that said trust deed and notes were delivered to one, Steve G. Anderson, in consideration for money due him for erecting the building on premises described in the complaint for Byrne B. Olson; that subsequently, Olson defrauded in payment of notes and entered into an agreement with Anderson whereby Olson and his wife could convey premises to Anderson, in consideration thereof, Anderson would cancel the trust deed and notes sought to be foreclosed herein; that pursuant to the agreement, Byrne B. Olson and Ethel Olson conveyed the premises to Gustave Anderson on March 20, 1942, which deed was recorded as document No. 12824135, and was in full payment and satisfaction of indebtedness and notes and trust deed representing same and that thereby the lien of the trust deed became extinguished and merged with the fee of premises; that by reason of said merger there is nothing due to plaintiff under said trust deed and notes; that plaintiff is trying this mortgaging the premises which he foreclosed that trust deed.

The answer of the defendant admits that on October 22, 1920, plaintiff paid Harry Lesser Lesser (?) Thousand Nine Hundred Sixty Six and 60/100 ($1,966.60) Dollars, and that with Harry Lesser a certificate of redemption, and the defendant denies that plaintiff is entitled to recover Twenty Four Thousand Nine Hundred Sixty Six and 40/100 ($24,966.40) Dollars, on an agreement under said trust deed and denies that there is due plaintiff the sum of Fifty Thousand Four Hundred Seventeen and 18/100 ($50,417.18) Dollars, or that the trust deed is a lien on the property described.

It further admits that the admit that the premises are an authentic manor of Washington and Central Avenue, Chicago, and are improved with a three story brick building, containing 12 apartments.

and 3 stores and that the monthly income derived therfrom is approximately $700.00 to $800.00 per month, or $10,800.00 per year; that the improvements are approximately 12 years old and that the entire property has the fair cash market value of Fifty Thousand ($50,000.00) Dollars.

The contentions of the defendant are that the burden of showing the necessity for the appointment of a receiver is on the plaintiff, and that plaintiff has not sustained that burden either by the Complaint or petition or by testimony. Plaintiff's answer to these contentions is that a court of chancery will appoint a receiver on consideration of all the equities in the case in order to preserve the property in its custody for whichever of the parties will ultimately prove to be entitled thereto.

It would appear from the Answer of the defendant that he contends plaintiff's mortgage is invalid because it is merged with the title, and further that plaintiff's redemption is void. This, of course, is a question which is the issue to be determined by the court on a final hearing. The question which we are concerned with is whether the court was in error in appointing a receiver where it appears from the statements which are contained in the petition and complaint and the answer of the defendant and not being in possession of the premises, there is an issue of fact to be determined by the court and apply the law as it will control upon a question of like character.

It would seem that the defendant would have no standing in court upon the question that we have before us for the reason that the court has not yet determined whether there was a merger of the title; and, therefore, there was a situation that the court was obliged to take into consideration in the appointment of the Receiver in question. Under the circumstances the court was justified in appointing a receiver until the questions which were raised by the

and 3 stores and that the monthly income derived therefrom is approximately $700.00 to $800.00 per month, or $10,800.00 per year; that the improvements are approximately 14 years old and that the entire property has the fair cash market value of fifty thousand ($50,000.00) dollars.

The contentions of the defendant are that the burden of showing the necessity for the appointment of a receiver is on the plaintiff, and that plaintiff has not sustained that burden either by the Complaint or petition or by testimony. Plaintiff's answer to these contentions is that a court of chancery will appoint a receiver on consideration of all the equities in the case in order to preserve the property in its custody for whichever of the parties will ultimately prove to be entitled thereto.

It would appear from the answer of the defendant that he contends plaintiff's mortgage is invalid because it is merged with the title, and further that plaintiff's indebtedness is void. This, of course, is a question which is the issue to be determined by the court on a final hearing. The question which we are concerned with is whether the court was in error in appointing a receiver where it appears from the statements which are contained in the petition and complaint and the answer of the defendant and not being in possession of the premises, there is an issue of fact to be determined by the court and apply the law as it will control upon a question of like character.

It would seem that the defendant would have no standing in court upon the question that we have before us for the reason that the court has not yet determined whether there was a merger of the title; and, therefore, there is a question that the court was obliged to take into consideration in the appointment of the receiver in question. Under the circumstances the court was justified in appointing a receiver until the questions which were raised by the

issue are determined and a decree upon the question is entered. A receiver should be appointed if it is made to appear that there is a necessity to preserve the property for such parties as shall be entitled to the benefit. First National Bank v. Chase, 73 Ill. 307,308.

There is a further question which should be considered, it having been made by the defendant, that there was utterly no proof made as to the value of the property, and that the complaint and petition made no adequate statement of its value, and that the court took no evidence, refusing an offer of defendant's counsel to do so. Of course, the defendant in his answer admitted that the plaintiff invested in the redemption of the premises, which would indicate that he has a substantial interest in the subject matter of this litig tion, and if the defendant desired to offer testimony upon the question of the financial interest which the plaintiff had in this foreclosure proceeding, he could have offered evidence by calling witnesses to the stand for the purpose of testifying and if this was refused he could have offered to prove the facts which he believed the witnesses would have proven by their testimony. This the defendant did not do, and as the court in the case of Stevens v. Newman, 68 Ill. App. 549, stated in its opinion:

> "A mere statement of an offer to prove is not anything upon which a court is called upon to act. The witnesses should be called and questioned, or documentary evidence produced."

and again in the case of Strong v. Friedman, 261 Ill. App. 307, the court quoted from case entitled Chicago City Ry. Co. v. Carroll, 206 Ill. 318, upon a like question, where the court said:

> "Appellant, in fact, offered no evidence upon the matter. No witness was put on the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel * * * and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. * * * If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relating to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

issue are determined and a decree upon the question is entered. A receiver should be appointed if it is made to appear that there is a necessity to preserve the property for such parties as shall be entitled to the benefit. First National Bank v. Ham, 70 Ill. App. 309.

There is a further question which should be considered, it having been made by the defendant, that there was actually no proof made as to the value of the property, and that the complaint and petition made no adequate statement of its value, and that the court took no evidence, returning an order of defendant's counsel to do so. Of course, the defendant in his answer admitted that the plaintiff invested in the redemption of the premises, which would indicate that he has a substantial interest in the subject matter of this litigation, and if the defendant desired to offer testimony upon the question of the financial interest which the plaintiff had in this foreclosure proceeding, he could have offered evidence by calling witnesses to the stand for the purpose of testifying and if this was refused he could have offered to prove the facts which he believed the witnesses would have proven by their testimony. This the defendant did not do, and so the court in the case of Stevens v. Brown, 65 Ill. App. 560, stated in its opinion:

"I were ultimately of an affir is there is not anything upon which a court is called upon to act. The witnesses should be called and examined, or documentary evidence produced."

And again in the case of Stone v. Tribbey, 181 Ill. App. 202, the court quoted from one entitled Chicago City Ry. Co. v. Carroll, 206 Ill. 318, upon a like question, where the court said:

"Objection, is that, offered no evidence upon the matter. As matters now put on the stand, no question was asked. Nothing was done except a mere conversation or talk had between counsel * * * and the court. Such proceeding on that does not consist in offer of evidence, and the remarks of the court did not consist in a refusal to admit evidence. * * * If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and propounded for enough that the question relating to the point of is she said it was desired to offer evidence upon the trial, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

From this record as we have examined it the court did not refuse to hear evidence from a witness on the stand ready to testify. The defendant contends that the court utterly failed to take any evidence whatever on the contention, but even refused to do so, and based its order for appointing a receiver on the sworn complaint and petition only, and that such action was contrary to law.

As we have already indicated the question presented to this court is a question of merger; that being a question which will have to be determined by the court on the hearing, we are not of the opinion that the trial court erred in appointing a receiver of the property in question.

The question which remains to be determined is whether the court in entering an order appointing a receiver without any testimony whatever abused its discretion. In one of the cases called to our attention by the plaintiff, Schack v. Bailey, 97 Ill. App. 660, this court said:

> "An application for the appointment of a receiver is addressed to the sound judicial discretion of the court, taking into account all the circumstances of the case, and, if exercised, is for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and the subject matter " " "."

and again this court said in McDougall Co. v. Goode, 247 Ill. App. 170,

> "The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to maintain the status quo and preserve the equitable rights of the parties."

Under the facts as they are alleged in the plaintiff's complaint and petition for the appointment of a receiver and the defendant's answer, we believe that the court was fully justified in appointing a receiver and did not abuse its discretion in making such appointment.

For the reasons stated the order of the Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

From this record we see have examined it the court did not refuse to hear evidence from a witness on the stand ready to testify. The defendant contends that the court utterly failed to take any evidence whatever on the contention, but even refused to do so, and point the error for withholding a decision on its sworn counter-petition only, and that such action was contrary to law.

As we have already indicated the question presented to this court is a question of merger; that being a question which will have to be determined by the court on the hearing, we are not of the opinion that the trial court erred in appointing a receiver of the property in question.

The question which remains to be determined is whether the court in entering an order appointing a receiver without any restraint whatever abused its discretion. In one of the cases relied to now attention by the plaintiff, Johnson v. Mabry, 87 Ill. App. 480, this court said:

"A application for the appointment of a receiver is addressed to the sound judicial discretion of the court, taking into account all the circumstances of the case, and, if exercised, is for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and the subject matter." ".

and again this court said in Commercial Co. v. Burke, 147 Ill. App. 170,

"The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the investigation exact judicial the necessary to maintain the status quo and preserve the equitable rights of the parties."

Under the facts as they are alleged in the plaintiff's complaint and petition for the appointment of a receiver and the defendant's answer, we believe that the court was fully justified in appointing a receiver and did not abuse its discretion in making such appointment.

For the reasons stated the order of the court is affirmed.

PUBLISHED IN ABSTRACT

**People of the State of Illinois, Plaintiff in Error, v. James D. Flynn, Defendant in Error.**

**Gen. No. 9222**



MR. JUSTICE FULTON delivered the opinion of the court.

The grand jury of Champaign County returned an indictment against James D. Flynn on April 12, 1939, for malfeasance in office. The indictment consists of nine counts. The first count charges that the defendant, during all of the time between the 1st day of January, 1938, and the 15th day of February, 1939, was the duly elected, qualified and acting Mayor of the City of Champaign, in Champaign County, Illinois, and that during all of said time he did wilfully, intentionally and unlawfully fail and omit to perform his official duty as Mayor of the said City of Champaign, in that he did, then and there, wilfully and intentionally fail, neglect and omit to use any sincere effort or to make any sincere endeavor or attempt whatever to stop gaming and the keeping of common gaming houses in said City of Champaign, which said gaming was then and there in progress and which said common gaming houses were then and there being kept and operated in said City of Champaign, in violation of the laws of the State of Illinois. And so the grand jurors charged that the defendant "is guilty of a palpable omission of his official duty."

The second count is the same as the first count, except it charges failure to make "any effort" to stop the keeping of houses of ill fame.

The third count is the same as the first count, except it charges a failure to make "any effort" to stop the setting up of lotteries for money.

The fourth count is like the first count, except it charges that it was the duty of the defendant to make a sincere effort to stop gaming and the keeping of common gaming houses in the City of Champaign, and it does not add the charge that he "is guilty of a palpable omission of official duty."

The fifth count is like the second count, except it charges that it was the duty of the defendant to make a sincere effort and endeavor and attempt to stop the keeping and maintaining of houses of ill fame, and it

charges that the defendant then and there "wilfully, knowingly, intentionally, palpably and unlawfully" failed and omitted to perform his official duty as Mayor in that he wilfully, knowingly and intentionally failed, neglected and omitted to make any sincere effort or endeavor or attempt to stop the keeping and maintaining of houses of ill fame, etc.

The sixth count is like the third count, except it charges that it was the duty of the defendant to make a sincere effort and endeavor to stop the setting up and promotion of lotteries for money, and that the defendant "wilfully, knowingly, intentionally, palpably and unlawfully" failed and omitted to perform his official duty in that he failed, neglected and omitted to make any sincere effort to stop the setting up and promotion of lotteries for money.

The seventh count is like the fourth count, except that it pleads an ordinance of the city of Champaign, which provides that the Mayor "shall have the general supervision and control of the police," and charges that "it then and there became and was the duty of the said James D. Flynn, under said ordinance and under the laws, to make a sincere effort and endeavor and attempt to stop gaming and the keeping of gaming houses in the said city of Champaign.

The eighth count is like the fifth count, except it pleads an ordinance of the city of Champaign, which provides that the Mayor "shall have the general supervision of the police" and charges that "it then and there became and was the duty of the said James D. Flynn, under said ordinance and under the law, to make a sincere effort and endeavor and attempt to stop the keeping and maintaining of houses of ill fame in the City of Champaign."

The ninth count is like the sixth count, except it pleads an ordinance of the City of Champaign, which provides that the mayor "shall have the general supervision and control of the police," and it charges that "it then and there became and was the duty of the said James D. Flynn, under said ordinance and under the law, to make a sincere effort and endeavor and attempt to stop the setting up and promotion of lotteries for money in the City of Champaign."

Three of these counts — the first, fourth and seventh—are based on the failure of the defendant to stop gaming and the keeping of common gaming houses in the City of Champaign. Three of the counts —the second, fifth and eighth—are based on the failure

to stop the keeping of houses of ill fame in Champaign. And three of the counts—the third, sixth and ninth—are based on the failure to stop the setting up and promotion of lotteries for money in the City of Champaign.

Seven of the counts—the first, fourth, fifth, sixth, seventh, eighth and ninth—charge a failure to make any "sincere effort" to stop gaming, etc., and two counts—the second and third—charge a failure to make "any effort" to stop the keeping of houses of ill fame, etc.

Three of the counts—the first, second and third—charge that the defendant "wilfully, intentionally and unlawfully" failed to perform his official duty as Mayor, and six of the counts—the fourth, fifth, sixth, seventh, eighth and ninth—charge that the defendant "wilfully, knowingly, intentionally, palpably and unlawfully" failed to perform his duty as Mayor.

The defendant in error filed a motion to quash the indictment and each and every count thereof. After argument the Circuit Court of Champaign County allowed the motion, entered an order quashing the indictment and discharged the defendant in error.

The plaintiff in error contends that the indictment is sufficient to charge the defendant in error with palpable omission of duty and asks that the judgment of the trial court be reversed and the case remanded for trial.

The defendant in error insists that the order of the Circuit court was correct and sets forth many reasons why the indictment is insufficient. In our view of the case it is only necessary to consider the second ground urged in his brief as follows:

> "The indictment is defective because it does not apprise the defendant of the nature and cause of the accusation against him with sufficient particularity to enable him to prepare his defense and to plead conviction or acquittal in bar of a subsequent prosecution."

The charge in the indictment in this case is based upon the violation of Par. 449, Chapter 38, Ill. Rev. Statutes, 1937, State Bar Assn. Ed., which reads as follows:

> "Every person holding any public office (whether state, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty, or who shall be guilty of diverting any public money from the use or purpose for which it may have been

appropriated, or set apart by or under authority of law, or who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject matter of the contracts, or who shall be guilty of wilful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding $10,000.00, and may be removed from his office, trust or employment."

The plaintiff in error suggests the section of the Statute which provides than an indictment in the language of the Statute creating the offense or so plainly that the nature of the offense may be easily understood by the jury is sufficiently correct. Ill. Rev. Statutes, 1937, Chap. 38, Par. 716.

The Sixth Amendment to the Constitution of the United States provides that the accused has the right to be informed of the nature and cause of the accusation against him.

Section Nine of Article Two, of the Constitution of the State of Illinois provides that the accused has the right to demand the nature and cause of the accusation against him.

In many cases in Illinois, it has been held that such constitutional provisions mean that sufficient facts must be set out in the indictment or information to enable the defendant to prepare his defense and to avail himself of his conviction or acquittal for protection against further prosecution for the same offense. This appears to be a necessary requirement even though the indictment or information was set out in the specific language of the Statute.

In the case of *People* v. *Green*, 368 Ill. 242, the information charges that the defendant did "drive a vehicle upon a public highway of this State situated within the limits of the City of Chicago—with a wilful and wanton disregard for the safety of persons or property", etc. The basis for the indictment was the violation of Sec. 48, Par. 323, Chapter 121, of the State Bar Ed. of Rev. Statutes, 1935, which provided:

"Any person who drives any vehicle with a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving."

The Supreme Court held the information insufficient and void and said:

"The information in the present case did not allege a single fact and there was nothing in it from which the defendant could tell definitely, or even guess, what acts he may have been charged with. It might have been driving while intoxicated, or running through a stoplight, or driving at an excessive speed or without brakes, lights or horn; he may have been driving on the wrong side of the road or on the sidewalk, or without keeping proper lookout for children, or any one of dozens of things which might constitute wilful and wanton disregard for the safety of persons or property. Neither does it specify where the offense took place, as it might have been on any street or highway in the whole of Chicago, and it might have taken place on any date within eighteen months prior to the filing of the information. All that appears in this information is that in the opinion of the person who wrote it and the person who signed it, the defendant had been guilty of driving a vehicle with wilful and wanton disregard for the safety of persons or property. It thus fails to meet either of the two basic requirements of an information. It does not give defendant enough information to prepare his defense and it is not sufficiently definite to be of any value as a bar to further prosecution."

In *People* v. *Brown,* 336 Ill. 257, an information charged that the defendant "did wilfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery, without a valid existing license so to do". The information was couched in the language of the Statute. The Court quoted and adopted the following rule: "As the rule is sometimes stated, the allegation must descend far enough into particulars and be certain enough in its frame of words to give the respondent reasonable notice of what will be produced against him at the trial," and further "The general rule is that it is sufficient to state the offense in the language of the Statute, but this rule applies only where the Statute sufficiently defines the crime. Where the Statute creating the offense does not describe the act or acts which compose it, they must be specifically averred in the indictment or information." Many other Illinois cases have announced and adopted this rule. *People* v. *Barnes,* 314 Ill. 140. *People* v. *West,* 137 Ill. 189.

The indictment in this case does not allege any knowledge on the part of the defendant in error. There is no charge in any of the counts of the indictment designating or setting out where the said law violations occurred, when they took place or the persons or places conducting the said violations of the Statute.

We cannot conceive how a defendant could possibly prepare a defense to such blanket charges covering a period from January 1st 1938 to the 15th of February, 1939. The prostitution, the lotteries and the gambling complained of might have been conducted by various people at various locations and at various times, all of which were unknown to the defendant in error.

In our judgment the indictment does not give the defendant enough information to prepare his defense and it is not sufficiently definite to be of any value as a bar to further prosecution. The Circuit Court correctly allowed the motion to quash and the judgment is affirmed.

*Affirmed.*

14 (A-19598—14)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HURFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On APR 2 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9509 Ag. No. 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, 1940

Laura M. Russell,
(Plaintiff) Appellee

vs.

New York Life Insurance Company,
a corporation,
(Defendant) Appellant.

Appeal from County Court
of Peoria County, Illinois

WOLFE, P.J.

On March 15, 1926 and July 29, 1926, the New York Life Insurance Company issued two policies of insurance to the plaintiff. Each policy contained a total and permanent disability clause as follows: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit." On September 12, 1938, the plaintiff, Laura M. Russell, plaintiff-appellee, instituted a proceeding against the New York Life Insurance Company, the appellant, in which she calimed that she was totally, permanently, continuously and wholly disabled and prevented from performing any work or engaging in any occupation for compensation. The defendant filed its answer and set forth the disability provisions of the policies and denied liability, claiming that the plaintiff was not totally disabled, as required by the policy of insurance. The cause was tried before a jury resulting in a verdict in favor of the plaintiff for $516.00. Judgment was rendered on the verdict, and the New York Life Insurance Company perfected an appeal to this Court.

The plaintiff introduced evidence tending to show that while she was endeavoring to hang wall paper in her home, she was standing on a board which was placed across a writing desk, and that she fell off of the board and hurt her back. The testimony further was that as a result of such fall, whenever she tried to work, she had pains

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PRELIMINARY TERM, 1941

James M. Wunnell,
(Plaintiff) Appellee

Appeal from County Court
of Lake County, Illinois

Vs.

New York Life Insurance Company,
a corporation,
(Defendant) Appellant.

WRIT, J.C.

On March 15, 1938 and July 22, 1938, the New York Life Insurance Company issued two policies of insurance to the plaintiff. Each policy contained a total and permanent disability clause as follows: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit." On September 12, 1938, the plaintiff, James M. Wunnell, plaintiff-appellee, instituted a proceeding against the New York Life Insurance Company, the appellant, in which she claimed that she was totally, permanently, continuously and wholly disabled and prevented from performing any work or engaging in any occupation for compensation. The defendant filed its answer and set forth the disability provisions of the policies and denied liability, claiming that the plaintiff was not totally disabled, as required by the policy of insurance. The cause was tried before a jury resulting in a verdict in favor of the plaintiff for $316.00. Judgment was rendered on the verdict, and the New York Life Insurance Company perfected an appeal to this Court.

The plaintiff introduced evidence tending to show that while she was endeavoring to hang wall paper in her home, she was standing on a board which was placed across a writing desk, and that she fell off of the board and hurt her back. The testimony further was that as a result of such fall, however she tried to work, she had pains

and threw up her food; that she had to remain on a diet of fruit juices, soup and liquid; that she was unable to do, and had not been able to do any work of any kind; that she had been continuously prevented from doing any work since her accident. Doctor C. A. Cox testified that he had examined the plaintiff; that she had tenderness across her back and in his opinion, she was totally disabled from doing any work. Doctor E. C. Burhans was called as a witness and his testimony is similar to that of Doctor Cox. To rebut this evidence that the plaintiff was totally disabled from doing work, the defendant called numerous witnesses, some of them next door neighbors of the plaintiff, who testified that they observed the plaintiff doing the work around the house since the accident; that she did part of her own ironing; that she would sweep off her steps and sweep the living room; that the plaintiff had stated to one witness, "That if she was not able to get any disability from the Insurance Company, that she would like to get a job in a restaurant as a waitress." Witnesses further testified that they had seen the plaintiff hanging up clothes, carry clothes, handling boxes, driving the car, carrying the rakes and shovels in the yard around the house, pick beans in the garden, and climb through the garden fence. Other witnesses testified that they had seen the plaintiff drive her car, dance, eat fried fish, potatoes, vegetables and everything else that any one in normal health could eat.

This Court had occasion in the case of Sibley vs. Travelers' Insurance Company, 275 Ill. App. 323 and Buffo vs. Metropolitan Life Insurance Company, 277 Ill. App. 366, to interpret the language used in insurance policies of this kind. We there held that the language is not ambiguous and that before a person could recover under such policies they must show that their disability was such that they were wholly prevented from performing any work or following any occupation. The Appellate Court of the Fourth District in the case of Wayckoff vs. Metropolitan Life Insurance Company in 302 App. at Page 241 held, that when a woman had had tuberculosis for three months and the doctor had reported that the disease was arrested, and that he had permitted the plaintiff to do light housework, under

and threw up her food; that she had to remain on a diet of fruit juices, soup and liquid; that she was unable to do, and had not been able to do any work of any kind; that she had permanently prevented from doing any work since her accident. Doctor G. A. Cox testified that he had examined the plaintiff; that she had tenderness across her back and in his opinion, she was totally disabled from doing any work. Doctor E. G. Burness was called as a witness and his testimony is similar to that of Doctor Cox. To rebut this evidence that the plaintiff was totally disabled from doing work, the defendant called numerous witnesses, some of them next door neighbors of the plaintiff, who testified that they observed the plaintiff doing the work around the house since the accident; that she did part of her own ironing; that she would sweep off her steps and sweep the living room; that the plaintiff had stated to one witness, "that if she was not able to get her disability from the Insurance Company, that she would like to get a job in a restaurant as a waitress." Witnesses further testified that they had seen the plaintiff hanging up clothes, sewing clothes, handling boxes, driving the car, carrying the rakes and shovels in the yard around the house, pick beans in the garden, and walk through the garden fence. Other witnesses testified that they had seen the plaintiff drive her car, dance, eat fried fish, potatoes, vegetables and everything else that any one in normal health could eat.

This Court had occasion in the case of Kibley vs. Travelers' Insurance Company, 272 Ill. App. 329 and Burke vs. Metropolitan Life Insurance Company, 277 Ill. App. 366, to interpret the language used in insurance policies of this kind. We there held that the language is not ambiguous and that before a person could recover under such policies they must show that their disability was such that they were wholly prevented from performing any work or following any occupation. The Appellate Court of the Fourth District in the case of Wayshoff vs. Metropolitan Life Insurance Company in 202 App. at Page 241 held, that when a woman had had tuberculosis for three months and the doctor had reported that the disease was arrested, and that he had permitted the plaintiff to be light housework, under

the terms of a similar policy, she could not recover.

We are fully aware that it is a rule of law that after a jury had decided a question of fact, that great weight should be given it, both by the trial court and a court of review, but where the verdict of a jury is manifestly against the weight of the evidence, it is the duty of the reviewing court to set the same aside. In the present case we are of the opinion that the verdict of the jury was manifestly against the weight of the evidence, therefore, the judgment must be set aside. The usual practice in such cases would be for this Court to reverse and remand the case. Both the appellant and the appellee, in their printed brief, have requested this court, that in case this judgment was reversed, not to remand the case, but enter an order of reversal and terminate the litigation. Therefore, pursuant to the request of appellant and appellee, the judgment of the trial court will be reversed and the remanding order will be omitted.

Judgment Reversed.

the basis of a similar policy, she could not recover.

We are fully aware that it is a rule of law that after a jury had decided a question of fact, that great weight should be given it, both by the trial court and a court of review, but where the verdict of a jury is manifestly against the weight of the evidence, it is the duty of the reviewing court to set the same aside. In the present case we are of the opinion that the verdict of the jury was manifestly against the weight of the evidence. Therefore, the judgment must be set aside. The usual practice in such cases would be for this Court to reverse and remand the case. Both the appellant and the appellee, in their printed brief, have requested this court, that in case this judgment was reversed, not to remand the case, but enter an order of reversal and terminate the litigation. Therefore, pursuant to the request of appellant and appellee, the judgment of the trial court will be reversed and the remaining cause will be entitled.

Judgment Reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
*Clerk of the Appellate Court*

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Be it Remembered, That, to-wit: On the 5th day of June, A. D. 1940, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

In the Appellate Court of Illinois,

Second District.

May Term, A. D. 1940.

| | |
|---|---|
| Laura Russell, Plaintiff-Appellee, vs. New York Life Insurance Company, a corporation, Defendant-Appellant. | Appeal from County Court, Peoria County, Illinois. |

IN RE: PETITION FOR REHEARING.

The concluding part of the opinion filed in this case is, "The usual practice in such cases would be for this Court to reverse and remand the case. Both the appellant and appellee, in their printed brief, have requested this Court, that in case this judgment was reversed, not to remand the case, but enter an order of reversal and terminate the litigation. Therefore, pursuant to the request of appellant and appellee, the judgment of the trial court will be reversed and the remanding order will be omitted.

In the petition for rehearing the appellee quotes the latter part of our opinion and now urges that this statement be given further consideration by this Court, that this Court has misunderstood the language used by the appellee in their brief. On Page 17, of the brief of appellee we find the following: "The verdict in this case is only for $516.00. The case took three days to try. Further expense and additional time is required of both parties by virtue of this appeal. If this case is reversed and remanded for another trial further expense, wasted effort and delay will result to both parties. The defendants in their brief in the

In the Commonwealth Court of Pennsylvania, Middle District, on the 3rd day of June, A. D. 1940, upon this application were had all and singular the matters and things, which follow in the following, viz:

In the Supreme Court of Illinois,

Second District,

New York, N. Y. 1940.

Jesse Bennett,
Plaintiff-appellee,

vs.

The Tom Jay Insurance Company, a corporation,
Defendant-appellant.

Appeal from Superior Court, Peoria County, Illinois.

OPINION. MR. JUSTICE BLACKWELL DISSENTING.

The controlling part of the opinion filed in this case is, upon general principle in such cases would be the duty of the court to reverse and remand the case. Both the appellant and appellee, in their briefs herein, have requested this court, that in case this judgment was reversed, not to remand the cause for another or further of reversal, but instead the Illinois Supreme Court, to the request of appellant and appellee, the judgment of the trial court will be reversed and the remanding order will be entered.

In the position for submitting the appellee quotes the latter part of our opinion and now argues that this statement be given further consideration by this Court, that this court has misunderstood the language used by the appellee in their brief. On Page 17, of the brief of appellee we find the following: "The verdict in this case is only for $12,000. The case then there are to Supreme supreme and additional also is reduced of both parties by reason of this appeal. If this case is reversed and remanded the entire trial further expense, which effect not only will result in this matter. The difference in that trial in the

concluding paragraph state, * * * "Defendant respectfully requests that this Court reverse the judgment of the trial court without remand. We therefore join with the defendant in its request that this case be reversed outright or affirmed. The defendant company argues at some length about the weight of the evidence, and while this is unnecessary in view of its request stated above, we will give the Court our views of the question, although still join in such request."

It seems to us that the attorney for the appellee could not have expressed in the English language more clearly a request of this Court that if the case was reversed, not to remand it.

The petition for a rehearing is hereby denied.

(Signed) Fred G. Wolfe

(Signed) Franklin R. Dove

(Signed) Blaine Huffman

(Endorsed on the back as follows:

FILED Jun 5 1940 Justus L. Johnson Clerk Appellate Court-Second Dist.)

establishing precedents which, [illegible] inevitably ex-
plode that this court reverse the judgment of the trial court
without remand. We therefore join with the majority in its
request that this case be reversed outright or without. The
defendant company stands at some length about the weight of
the evidence, and while this is unnecessary in view of the
reasons stated above, we will give the court our view of the
question, although still join in such request.

It seems to me that the attorney for the appellee could
not have expressed in the English language more clearly a
request of this Court that if the case was reversed, not to
remand it.

The petition for a rehearing is hereby denied.

(signed) Tom C. Clark

(signed) Douglas W. Kelly

(signed) John Sutton

[Endorsed on the cover as follows:

"No. 2. Lab. Denied C. Dodson, Clerk, Appellee, Appellant Pro Se."]

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. MEYER, Sheriff



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BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9535 AGENDA NO. 27

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

| | |
|---|---|
| JOHN HOHNER, et al., Appellants, vs. AMERICAN SILICA CORPORATION, et al., Appellees. | APPEAL FROM CIRCUIT COURT LASALLE COUNTY. |

HUFFMAN - J.

Appellee Beatty and appellants were interested in enterprises which owned and produced crude sand in LaSalle county. Beatty and some of his associates conceived the idea of bringing together into one organization all of the crude sand pits in said county. Pursuant to such plan, Beatty employed one Nye Johnson to procure from the various owners of crude sand pits in said county, options to purchase their property. During the year 1927, Johnson went about among the owners of crude sand pits in that county, of whom appellants were a part, and in furtherance of the plan of Beatty as above indicated, procured from such owners options for the purchase of their property. It appears that appellants and the other owners understood the plan of Beatty to bring these pits under one organization.

In the following year, 1928, Beatty in consummating the above plan, caused to be organized the American Silica Corporation, under the laws of Deleware. The corporation was duly licensed to transact

business in the State of Illinois. The main office was in Chicago. Soon after the organization of the corporation, the Board of Directors met in Chicago, when Beatty was elected President. At a later day a resolution was adopted to amend the certificate of incorporation to change the capital stock from one hundred shares of no par value, to 65,000 shares, of which 5,000 shares were to be preferred stock having a par value of $100 per share, and 60,000 shares to be common stock having no par value; and further, that the common shares might be issued by the corporation for services rendered and that the same should be deemed fully paid stock and not liable to assessment.

At a subsequent meeting of the Board of Directors, Beatty presented the proposal of Nye Johnson offering to transfer to the corporation the options he had taken on the crude sand pits in LaSalle county, among which were those forming the basis of appellants' claims. The proposal was based upon the consideration that for said options Johnson was to receive 43,327 shares of common stock, 400 shares of preferred stock, and $10,000 in cash. This proposal was accepted and the options duly assigned to the corporation. It then became necessary that the corporation float a $1,000,000 bond issue in order to pay for the property covered by the options.

It appears that the 43,327 shares of common stock which constituted a part of the consideration to Johnson, were not issued in his name; and that 19,998 shares of such stock were issued to Beatty and the ~~[illegible]~~ balance to other persons.

The new venture did not prove to be a financial success and the corporation went bankrupt. At the time of such bankruptcy, appellant Hohner had $1750 still due him, A. D. Perry (now deceased) had $11,387.50 due him, Fred Scherer (now deceased) had $2841.62 due him, and Nels Fruland had $8801.84 due him; all upon the purchase price for their sand pits as fixed in the option agreements taken by Johnson.

business in the State of Illinois. The main office was in Chicago. Soon after the organization of the corporation, the Board of Directors met in Chicago, when Beatty was elected President. It a later day a resolution was adopted to meet the requirements of incorporation to change the capital stock from one hundred thousand of no par value, to 45,000 shares, of which 3,000 shares were to be preferred stock having a par value of $100 per share, and 42,000 shares to be common stock having no par value; and further, that the common shares might be issued by the corporation for services rendered and that the same should be deemed fully paid stock and not liable to assessment.

At a subsequent meeting of the Board of Directors, Beatty presented the proposal of the Johnson syndicate to transfer to the corporation the options he had taken on the whole land plus in land-title money, among which were those forming the basis of appellants' claim. The proposal was based upon the consideration that for such options Johnson was to receive 42,327 shares of common stock, 300 shares of preferred stock, and $15,000 in cash. This proposal was accepted and the capital stock assigned to the corporation. It then became necessary that the corporation pay a $1,000,000 mortgage in order to pay for the property covered by the options.

It appears that the 42,327 shares of common stock which constituted a part of the consideration to Johnson, were not issued in his name; and that 42,000 shares of such stock were issued to Beatty and the remaining shares to other persons.

The two original six men joined by he a Theodore Wheeler and the corporation were bankrupt. At the time of such bankruptcy, appellant owed $1750 which was him, A. D. Perry (now deceased) had $15,000 due him, Fred Ledgerwood (now deceased) had $2000 due him, Wheeler had $2000 due him, and Wheeler owed the Bradley Estate $1000. The Judge said that the Bradley Estate was the only creditor of the Johnson syndicate entitled to payment.

This suit resulted, wherein appellants seek to recover their claims on the ground that their properties upon which Johnson took the options, were grossly overvalued and that in consequence, the stock issued therefor, of which Beatty received 19,998 shares, could not be considered as fully paid; and that the act of the corporation in issuing such stock and paying the $10,000 cash for the options, was fraudulent and in violation of the rights of appellants as creditors of the American Silica Corporation. The bill asked for an accounting to determine the correct value of the stock, and alleged that the stock and cash granted to Johnson for the options on the sand pits was of a much greater value than the options were worth.

Appellants claim to be creditors of the corporation within the contemplation of the trust fund theory. Appellees contend that the capital stock of the corporation was in no way the basis of any credit extended to it by appellants, or that appellants placed any reliance upon its capital structure; and that appellants' conveyances of their sand pits to the corporation were made pursuant to the options they had given to Johnson as Beatty's agent, which appellants allege contained a fictitious, excessive and fraudulent value.

The alleged excessive and fictitious valuations placed by appellants upon their properties constituted the consideration the corporation was to pay therefor, and no doubt served as a basis upon which it paid Johnson. Appellants urge that since such valuations were excessive and fictitious, the act of the corporation in granting the consideration to Johnson, was a fraud upon them as creditors of the corporation.

It is urged by appellees that a trust in favor of creditors of a corporation will not be enforced against stockholders in the manner appellants now seek to do, when the creditors had full knowledge of the arrangement urged as the ground for their recovery. Appellees

further urge that the trust fund theory is intended for the benefit of bona fide creditors of a corporation who have extended credit thereto in reliance upon itsprofessed capital, and has no application to persons who associate themselves with a promoter and a promotion scheme such as we find in this case.

We have set out the theory of appellants and appellees with respect to this case. The cause was heard on stipulation of the parties, and the trial court dismissed the bill for want of equity. Appellants bring this appeal urging for reversal, the ground above indicated.

The briefs of the parties are comprehensive upon their respective theories of the case. We see no good purpose to be served by a discussion or review of the authorities where cited. The question here to be determined is whether the trial court was correct in accepting appellee's theory of the case.

It appears that appellants knew of Beatty's plan to bring the sand pits together under one control and ownership, as was done, when they executed their options to Johnson. Appellants aver that such options were grossly excessive, and fictitious values placed upon their property. When the plan was consummated and the corporation paid Johnson for the options, appellants claim that such payment was in excess of the value of their properties, and therefore a fraud upon them, and that the stock which was issued to Beatty from that paid to Johnson was without consideration, and that Beatty should be held liable for the then value thereof.

It is stipulated that $1,250,000 was paid by the corporation to the various persons interested in the sand pits (including appellants) and based upon the prices as fixed in the options. Courts cannot mend a bargain because it proves to be improvident or unfortunate. It appears in this case that if appellants were injured, they were the

arbiters of their own injuries. A bad bargain cannot be turned into a good one by a subsequent lawsuit.

We are of the opinion that the trial court properly dismissed the bill for want of equity. The decree is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

*Clerk of the Appellate Court*

(73947) 7

40422

HATTIE GABL,

v.

FRANK GABL and ANNA FUNK,
Intervening Petitioners.

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ANNA FUNK,
Appellee,

v.

HATTIE GABL,
Appellant.

120 A

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

305 I.A. 620

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The only question originally involved in this proceeding was whether Frank Gabl or his wife, Hattie Gabl, was the owner of two first mortgage notes for $1,700 and $2,000, respectively, and two separate trust deeds securing same, said securities having been received by Frank Gabl as part of his share of his mother's estate. Hattie Gabl had not been living with her husband at the time he received these securities or for some time prior thereto. After same were delivered to him she returned to live with him as his wife, but left him again some time thereafter. The then attorney for both Frank and Hattie Gabl, who is the attorney for appellant, Hattie Gabl, on this appeal, instituted separate actions in her name on May 31, 1935, to foreclose the aforesaid trust deeds. In each of the foreclosure suits Frank Gabl filed an intervening petition, which alleged inter alia that the note and trust deed involved therein belonged to him and were wrongfully withheld from him by his wife. Hattie Gabl filed sworn answers to the intervening petitions, in which she alleged substantially that she acquired the securities involved as the result of a contract entered into between herself and her husband. Both cases were referred to a master on the issues formed by the intervening petitions and the answers

305 I.A. 620

MATTIE GABL,
Appellant,

v.

ANNA YUNK,
Appellee.

---

FRANK GABL and ANNA YUNK,
Intervening Petitioners.

v.

MATTIE GABL,

COOK COUNTY,

APPEAL FROM CIRCUIT COURT,

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The only question originally involved in this proceeding was whether Frank Gabl or his wife, Mattie Gabl, was the owner of two first mortgage notes for $1,700 and $2,000, respectively, and two separate trust deeds securing same, said securities having been received by Frank Gabl as part of his share of his mother's estate. Mattie Gabl had not been living with her husband at the time he received these securities or for some time prior thereto. After same were delivered to him she returned to live with him as his wife, but left him again some time thereafter. The same attorney for both Frank and Mattie Gabl, who is the attorney for appellant, Mattie Gabl, on this appeal, instituted separate actions in her name on May 31, 1935, to foreclose the aforesaid trust deeds. In each of the foreclosure suits Frank Gabl filed an intervening petition, which alleged inter alia that the note and trust deed involved therein belonged to him and were wrongfully withheld from him by his wife. Mattie Gabl filed sworn answers to the intervening petitions, in which she alleged substantially that she acquired the securities involved as the result of a contract entered into between herself and her husband. Both cases were referred to a master on the issues formed by the intervening petitions and the answers

thereto. On March 27, 1937, by leave of court, Hattie Gabl filed a verified amendment to her answer theretofore filed in each of the foreclosure proceedings, in which amendment without deleting or withdrawing any of the allegations of her original answer she averred that the notes and trust deeds were delivered to her as a gift by her husband. Thus her sworn answers as amended presented two inconsistent (not alternative) versions of the manner in which she acquired title to the notes and trust deeds from her husband. Thereafter Frank Gabl by a written assignment sold, transferred and assigned to his sister, Anna Funk, "his title, right and interest" in all of his personal property, including and specifying the aforesaid notes and trust deeds and two additional notes. Gabl died July 4, 1937, and, his death having been suggested, Anna Funk under her assignment was substituted as intervening petitioner in his place and stead. After a full hearing the master filed his report finding that the assignment of Anna Funk was valid and further finding the issues in favor of the intervening petitioner. A decree was entered in accordance with the findings and recommendations of the master. Hattie Gabl appeals from this decree, assigning as error that said decree is contrary to the law and the evidence.

Anna Funk, the appellee, heretofore filed a motion "to affirm the decree of the court below" because of the failure of appellant to furnish an abstract of the record "sufficient to show the errors relied upon by said appellant, as required by the rules in that behalf." This motion was reserved to hearing. The affidavit filed by the attorney for appellee in support of said motion avers "that he has examined the transcript of the record therein on file in this court, and, has examined the document filed herein as an abstract of that record, and that he knows the contents thereof; that the said document purporting to be an abstract of the record does not contain any abstract of the pleadings in said cause, or any abstract of the master's report, or any abstract of the objections filed to the master's report, or any abstract of the decree rendered in said cause, or any abstract

thereto. On March 27, 1937, by leave of court, Hattie Gabl filed a verified amendment to her answer theretofore filed in each of the foreclosure proceedings, in which amendment without deleting or withdrawing any of the allegations of her original answer she averred that the notes and trust deeds were delivered to her as a gift by her husband. Thus her sworn answers as amended presented two inconsistent (not alternative) versions of the manner in which she acquired title to the notes and trust deeds from her husband. Thereafter Frank Gabl by a written assignment sold, transferred and assigned to his sister, Anna Funk, "his title, right and interest" in all of his personal property, including and specifying the aforesaid notes and trust deeds and two additional notes. Gabl died July 4, 1937, and his death having been suggested, Anna Funk under her assignment was substituted as intervening petitioner in his place and stead. After a full hearing the master filed his report finding that the assignment of Anna Funk was valid and further finding the issues in favor of the intervening petitioner. A decree was entered in accordance with the findings and recommendations of the master. Hattie Gabl appeals from this decree, assigning as error that said decree is contrary to the law and the evidence.

Anna Funk, the appellee, theretofore filed a motion "to affirm the decree of the court below" because of the failure of appellant to furnish an abstract of the record "sufficient to show the errors relied upon by said appellant, as required by the rules in that behalf." This motion was reserved to hearing. The affidavit filed by the attorney for appellee in support of said motion avers "that he has examined the transcript of the record therein on file in this court, and, has examined the document filed herein as an abstract of that record, and that he knows the contents thereof; that the said document purporting to be an abstract of the record does not contain any abstract of the pleadings in said cause, or any abstract of the master's report, or any abstract of the objections filed to the master's report, or any abstract of the decree rendered in said cause, or any abstract

of any documentary evidence offered in said cause; and, that said document omits part of the transcript of the oral testimony given in said cause, and states in altered form the transcript of other oral testimony given in said cause. Affiant further states that said document purporting to be an abstract of the record in said cause is wholly insufficient to present the issues in said cause intelligently to any mind. ***"

The attorney for the appellant filed written objections to the allowance of appellee's motion, which stated inter alia "that the affidavit attached to said motion, contains allegations which are far fetched and are without merit, and are made as excuses offered to harass the attorney for the appellant and to confuse the minds of the Honorable Judges of the Appellate Court; that the very purpose of the present practice act on which are based the Rules of the Appellate Court, adopted on April 15, 1937, are to limit long, useless and expensive procedure, followed by large printers bills in briefs and abstracts, and to limit the discussion to novel state of facts, or decide only material questions and issues, or decide new or unsettled questions of practice. Under Rule 1 of the Rules of the Appellate Court the attorney for the appellee could have been diligent, not indolent, and could have directed the Clerk of The Circuit Court of Cook County, Ill., to prepare a praecipe of additional parts of the record, for his own special use, which he failed to do."

Examination of the abstract filed by appellant discloses, as averred in the affidavit filed in support of appellee's motion, that the pleadings and the decree have not been abstracted at all and that the master's report and the objections filed thereto have not been fairly and fully abstracted.

Rule 6 of the Rules of Practice of the Appellate court provides, in part, as follows:

"In all cases, the party prosecuting an appeal in the Appellate Court shall furnish a complete abstract of the record, referring to

of any documentary evidence offered in said cause; and, that said document omits part of the transcript of the oral testimony given in said cause, and states in altered form the transcript of other oral testimony given in said cause. Affiant further states that said document purporting to be an abstract of the record in said cause is wholly insufficient to present the issues in said cause intelligently to any mind. ***"

The attorney for the appellant filed written objections to the allegations of appellee's motion, which stated inter alia "that the affidavit attached to said motion, contains allegations which are far fetched and are without merit, and are made as excuses offered to harass the attorney for the appellant and to confuse the minds of the Honorable Judges of the Appellate Court; that the very purpose of the present practice act on which are based the Rules of the Appellate Court, adopted on April 17, 1937, are to limit long, useless and expensive procedure, followed by large printers bills in briefs and abstracts, and to limit the discussion to novel state of facts, or decide only material questions and issues, or decide new or unsettled questions of practice. Under Rule 1 of the Rules of the Appellate Court the attorney for the appellee could have been diligent, not indolent, and could have directed the Clerk of The Circuit Court of Cook County, Ill., to prepare a praecipe of additional parts of the record, for his own special use, which he failed to do."

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Rule 6 of the Rules of Practice of the Appellate court provides, in part, as follows:

"In all cases, the party prosecuting an appeal in the Appellate Court shall furnish a complete abstract of the record, referring to

the pages of the record by numerals on the margin. Where the record contains the evidence it shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract shall be preceded by a complete index, alphabetically arranged, indicating the nature of each exhibit and the page where it may be found, and giving the names of the witnesses and the pages of the direct, cross and redirect examination. The abstract must be sufficient to present fully every error relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part." (Italics ours.)

The abstract filed herein was not merely incomplete and inaccurate as to some substantial part of the record but was incomplete as to every substantial portion thereof.

The appellant completely failed to abstract the essential portions of the record proper in clear violation of Rule 6. The purported abstract did not make a sufficient presentation of either the issues in the case or the errors relied upon for reversal. In discussing the failure of appellant to file a complete abstract in Staude et al. v. Schumacher et al., 187 Ill. 187, the court said at p. 188:

"The rules of this court require the party bringing a cause into this court to furnish a complete abstract or abridgment of the record, properly indexed, - such an abstract as will fully present every error and exception relied upon, and sufficient for the examination and determination of the case without an examination of the written record. In the case of Gibler v. City of Mattoon, 167 Ill. 18, we said (p. 22): 'It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us is, in the aggregate, extremely burdensome.'

"The decree must be affirmed for want of complete abstract. ***"

In Hickox v. City of Springfield, 208 Ill. 28, the court said at p. 29:

"Rule 14 of this court requires the party appealing to furnish such an abstract of the record as will fully present every error and exception relied on, and sufficient for the examination and determination of the case without any examination of the written record. Where a manifest attempt has been made to comply with this rule and the abstract is merely defective, it will be accepted by the court as sufficiently presenting the matters in issue, but if the opposing party is not satisfied with such abstract he may file an additional one and have the cost of the same taxed to the party filing the principal abstract, if the court shall finally determine that the additional abstract was necessary. This right of the opposing counsel, however, has never been construed to justify the filing of an abstract which does not pretend

the pages of the record by numerals on the margin. Where the record contains the evidence it shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract shall be preceded by a complete index, alphabetically arranged, indicating the nature of each exhibit and the page where it may be found, and giving the names of the witnesses and the pages of the direct, cross and redirect examination. The abstract must be sufficient to present fully every error relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is *incomplete* or *inaccurate* in any substantial part." (Italics ours.)

The abstract filed herein was not merely incomplete and inaccurate as to some substantial part of the record but was incomplete as to every substantial portion thereof.

The appellant completely failed to abstract the essential portions of the record proper in clear violation of Rule 6. The purported abstract did not make a sufficient presentation of either the issues in the case or the errors relied upon for reversal. In discussing the failure of appellant to file a complete abstract in Glaude et al. v. Schumacher et al., 197 Ill. 157, the court said at p. 158:

"The rules of this court require the party bringing a cause into this court to furnish a complete abstract or abridgment of the record, properly indexed, — such an abstract as will fully present every error and exception relied upon, and sufficient for the examination and determination of the case without an examination of the written record. In the case of Gibler v. City of Mattoon, 167 Ill. 18, we said (p. 22): 'It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us is, in the aggregate, extremely burdensome.'

"The decree must be affirmed for want of complete abstract. ***"

In Hickox v. City of Springfield, 208 Ill. 28, the court said at p. 29:

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to comply with rule 14, and thereby compel the other party to do what the appellant or plaintiff in error should have done. ***

"The judgment of the court below must be affirmed for want of a complete abstract."

Appellee's motion was timely, having been filed on November 28, 1938, and it should be considered as of that date. Since we reserved our decision on appellee's motion, she was compelled to file an additional abstract in order to protect her rights in her endeavor to sustain the decree. The additional abstract must therefore be eliminated from consideration in our determination of the question presented by appellee's motion. We are impelled at this time to allow appellee's motion to affirm the decree because the abstract filed by appellant did not even pretend to comply with Rule 6, hereinbefore set forth.

We have, however, notwithstanding that appellant's original and reply briefs are well nigh unintelligible, patiently and carefully read them with as much understanding as they would afford and are of opinion that there is no substantial error in the decree.

The decree of the Circuit court is affirmed for want of a complete abstract.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

to comply with rule 14, and thereby compel the other party to do what the appellant or plaintiff in error should have done, ***

"The judgment of the court below must be affirmed for want of a complete abstract."

Appellee's motion was timely, having been filed on November 28, 1938, and it should be considered as of that date. Since we reserved our decision on appellee's motion, she was compelled to file an additional abstract in order to protect her rights in her endeavor to sustain the decree. The additional abstract must therefore be eliminated from consideration in our determination of the question presented by appellee's motion. We are impelled at this time to allow appellee's motion to affirm the decree because the abstract filed by appellant did not even pretend to comply with Rule 6, hereinbefore set forth.

We have, however, notwithstanding that appellant's original and reply briefs are well nigh unintelligible, patiently and carefully read them with as much understanding as they would afford and are of opinion that there is no substantial error in the decree.

The decree of the circuit court is affirmed for want of a complete abstract.

DECREE AFFIRMED.

Friend and Seanlan, JJ., concur.

40517

ALLEN INDUSTRIES, Inc.,
a corporation,
Appellant,

v.

AMERICAN HAIR & FELT COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

305 I.A. 621

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Allen Industries, Inc., against defendant, American Hair & Felt Company, to recover damages for breach of an oral contract alleged to have been made in November, 1935, for the sale by defendant to plaintiff of 3,750,000 pounds of felting hair, approximately 25% of which was to be delivered in each of the four quarters of 1936. With its answer defendant asserted a counterclaim for the invoiced price of divers shipments of hair made by it to plaintiff. In its reply to the counterclaim plaintiff admitted its indebtedness to defendant for the amount claimed therein but alleged as the reason for the nonpayment of same defendant's liability for breach of the contract pleaded in the complaint. After a trial by the court without a jury the issues were found in favor of defendant both on its counterclaim and on plaintiff's complaint. Damages of $25,945.53 (including interest) assessed against plaintiff on the counterclaim were paid by it in open court. Judgment was entered in favor of defendant and against plaintiff on the latter's complaint and the amendment thereto. This appeal seeks to reverse that judgment.

Plaintiff's complaint as originally filed alleged substantially that an oral agreement between the parties was entered into by their respective presidents, Allen and Wilde, on November 5, 1935, under the terms of which plaintiff agreed to purchase and defendant agreed to sell 3,000,000 pounds of cattle hair and 750,000 pounds of calf hair

Allen Industries, Inc.,
a corporation,
Appellant,

v.

American Hair & Felt Company,
a corporation,
Appellee.

Appeal from Circuit Court,
Cook County.

305 I.A. 621

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Allen Industries, Inc., against defendant, American Hair & Felt Company, to recover damages for breach of an oral contract alleged to have been made in November, 1935, for the sale by defendant to plaintiff of 3,750,000 pounds of felting hair, approximately 25% of which was to be delivered in each of the four quarters of 1936. With its answer defendant asserted a counterclaim for the invoiced price of divers shipments of hair made by it to plaintiff. In its reply to the counterclaim plaintiff admitted its indebtedness to defendant for the amount claimed therein but alleged as the reason for the nonpayment of same defendant's liability for breach of the contract pleaded in the complaint. After a trial by the court without a jury the issues were found in favor of defendant both on its counterclaim and on plaintiff's complaint. Damages of $15,995.53 (including interest) accrued against plaintiff on the counterclaim were paid by it in open court. Judgment was entered in favor of defendant and against plaintiff on the latter's complaint and the amendment thereto. This appeal seeks to reverse that judgment.

Plaintiff's complaint as originally filed alleged substantially that an oral agreement between the parties was entered into by their respective presidents, Allen and Wilde, on November 5, 1935, under the terms of which plaintiff agreed to purchase and defendant agreed to sell 3,000,000 pounds of cattle hair and 750,000 pounds of calf hair

for delivery in 1936, 750,000 pounds of cattle hair and 187,000 pounds of calf hair "to be ascribed to, and as near as might be delivered in" each quarter of 1936; that a price of 6-1/2 cents a pound was thereupon agreed to for the hair ascribed to the first quarter and that "the price of the hair to be delivered during the succeeding quarters of the year 1936 should be such sum as was thereafter agreed to between the plaintiff and the said defendant;" that the hair ascribed to the first quarter was delivered and paid for; that plaintiff and defendant agreed on April 28, 1936, that the price for the 937,000 pounds of hair ascribable to the second quarter should be 7-1/2 cents a pound and that said hair was delivered and paid for at the agreed price; that August 26, 1936, plaintiff and defendant agreed "that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2 cents per pound," and that the hair ascribable to the third quarter was delivered; that on November 24, 1936, defendant refused to deliver the hair "ascribed to the fourth quarter" and thereby breached its contract; that plaintiff was obliged to purchase the amount of hair ascribable to the fourth quarter in the open market at a price of 5 cents a pound in excess of the price of 7-1/2 cents a pound stipulated by the parties in the agreement of August 26, 1936, and that by reason thereof plaintiff was damaged to the extent of $50,000; that an unpaid balance of $24,140 remained owing by plaintiff to defendant for hair delivered by it, which was ascribable to the third quarter; and that plaintiff offered to allow this amount as a set-off to the damages claimed by it.

Defendant filed a verified answer which denied the agreements alleged in the complaint to have been entered into by the parties on November 5, 1935, and on August 26, 1936, but admitted that an oral agreement was entered into in November, 1935, under the terms of which defendant was to ship 937,000 pounds of hair to plaintiff at a price of 6-1/2 cents a pound during the first quarter of 1936 and that that quantity of hair was delivered by defendant to plaintiff and paid for by the latter at the agreed price. The answer then

for delivery in 1936, 750,000 pounds of cattle hair and 187,000 pounds of calf hair "to be ascribed to, and as near as might be delivered in" each quarter of 1936; that a price of 6-1/2 cents a pound was thereupon agreed to for the hair ascribed to the first quarter and that "the price of the hair to be delivered during the succeeding quarters of the year 1936 should be such as was thereafter agreed to between the plaintiff and the said defendant;" that the hair ascribed to the first quarter was delivered and paid for; that plaintiff and defendant agreed on April 28, 1936, that the price for the 937,000 pounds of hair ascribable to the second quarter should be 7-1/2 cents a pound and that said hair was delivered and paid for at the agreed price; that August 26, 1936, plaintiff and defendant agreed "that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2 cents per pound," and that the hair ascribable to the third quarter was delivered; that on November 24, 1936, defendant refused to deliver the hair "ascribed to the fourth quarter" and thereby breached its contract; that plaintiff was obliged to purchase the amount of hair ascribable to the fourth quarter in the open market at a price of 9 cents a pound in excess of the price of 7-1/2 cents a pound stipulated by the parties in the agreement of August 26, 1936, and that by reason thereof plaintiff was damaged to the extent of $30,000; that an unpaid balance of $24,140 remained owing by plaintiff to defendant for hair delivered by it, which was ascribable to the third quarter; and that plaintiff offered to allow this amount as a set-off to the damages claimed by it.

Defendant filed a verified answer which denied the agreements alleged in the complaint to have been entered into by the parties on November 7, 1935, and on August 26, 1936, but admitted that an oral agreement was entered into in November, 1935, under the terms of which defendant was to ship 937,000 pounds of hair to plaintiff at a price of 6-1/2 cents a pound during the first quarter of 1936 and that that quantity of hair was delivered by defendant to plaintiff and paid for by the latter at the agreed price. The answer then

averred that the oral agreement alleged to have been entered into by the parties on November 5, 1935, did not create a valid and binding contract because by its very terms the price of the hair was left open to be later agreed upon between the parties; that on April 28, 1936, the parties entered into a written agreement with respect to the sale of hair by defendant to plaintiff for the second three months of 1936, said written agreement setting forth the quantity, quality, price and terms of delivery; and that on July 22, 1936, the parties entered into a written agreement with respect to a sale of hair for the third three months of 1936, which specified the quantity, quality, price and terms of delivery. The answer included a plea of the Statute of Frauds.

Defendant filed with its answer a counterclaim for $24,140, the amount which plaintiff's complaint admitted to be due and owing. The counterclaim pleaded the written agreement of July 22, 1936, relating to the hair sold for delivery during the third three months of 1936 and averred that all the deliveries for that quarter had been completed and that invoices for some of the shipments totalling $24,140 had not been paid. Plaintiff filed a verified answer to the counterclaim, which in substance restated and realleged the averments of its complaint.

This was the state of the pleadings when the case went to trial. After Sidney J. Allen, president of plaintiff company, testified that the alleged oral contract of November 5, 1935, which was made in Pennsylvania and to be performed in Michigan, provided for the delivery of hair for the entire year 1936, defendant, upon leave granted, filed an amendment to its answer, in which it pleaded the Statute of Frauds of each of said states.

After the close of all the evidence plaintiff over defendant's objection obtained leave to file and did file an amendment to its complaint. This amendment deleted from the original complaint the allegation that the parties agreed orally on August 26, 1936, "that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2¢ per pound" and substituted therefor an

averred that the oral agreement alleged to have been entered into by the parties on November 5, 1935, did not create a valid and binding contract because by its very terms the price of the hair was left open to be later agreed upon between the parties; that on April 28, 1936, the parties entered into a written agreement with respect to the sale of hair by defendant to plaintiff for the second three months of 1936, said written agreement setting forth the quantity, quality, price and terms of delivery; and that on July 22, 1936, the parties entered into a written agreement with respect to a sale of hair for the third three months of 1936, which specified the quantity, quality, price and terms of delivery. The answer included a plea of the Statute of Frauds.

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This was the state of the pleadings when the case went to trial. After Sidney A. Allen, president of plaintiff company, testified that the alleged oral contract of November 5, 1935, which was made in Pennsylvania and to be performed in Michigan, provided for the delivery of hair for the entire year 1936, defendant, upon leave granted, filed an amendment to its answer, in which it pleaded the Statute of Frauds of each of said states.

After the close of all the evidence plaintiff over defendant's objection obtained leave to file and did file an amendment to its complaint. This amendment deleted from the original complaint the allegation that the parties agreed orally on August 26, 1935, "that the price of the hair assertable to the third and fourth quarters of the year 1936 should be 7-1/2¢ per pound" and substituted therefor an

averment that in the alleged oral contract of November 5, 1935, the parties agreed that the price of hair for the last three quarters of 1936 "should be the average price paid by the defendant to tanners for hair of such kind and quality plus 1¢ per pound." Defendant's motion to strike the amendment to the complaint having been denied it filed a verified answer denying the allegations of said amendment and also pleaded the Statute of Frauds to the complaint as amended.

Plaintiff's theory as stated in its brief is "that the proofs established a contract by defendant to sell to plaintiff 3,750,000 pounds of hair, substantially one-fourth to be delivered in each of the four quarters of the year 1936, at a price of 1¢ in excess of the price paid by defendant to tanners for such hair; that the contract could have been fully performed within the space of one year from the time it was made; that defendant repudiated the contract in respect of the quantity allocable to the fourth quarter and that plaintiff was obliged to buy on the open market such quantity at prices about 4¢ over that determined by the contract."

Defendant's theory is that no contract or agreement was made in respect to the fourth quarter of 1936, which is the only period in controversy, and that the oral agreement alleged by plaintiff to have been entered into in November, 1935, if made, was void under the Statute of Frauds.

The primary question presented for our determination is whether the finding of the trial court that there was no contract or agreement made by the parties in respect to the fourth quarter of 1936 was manifestly against the weight of the evidence.

Plaintiff is a manufacturer of hair products - chiefly felt for various uses. Its plant is located in Detroit. Defendant, whose headquarters are in Chicago, is one of the largest dealers in hair, as well as a manufacturer of hair products which are competitive with those of plaintiff. On May 5, 1933, plaintiff by its written order made its first purchase of felting hair from defendant for

agreement that in the alleged oral contract of November 5, 1935, the parties agreed that the price of hair for the last three quarters of 1936 "should be the average price paid by the defendant to tanners for hair of such kind and quality plus 1¼ per pound." Defendant's motion to strike the amendment to the complaint having been denied it filed a verified answer denying the allegations of said amendment and also pleaded the Statute of Frauds to the complaint as amended.

Plaintiff's theory as stated in its brief is "that the proofs established a contract by defendant to sell to plaintiff 3,750,000 pounds of hair, substantially one-fourth to be delivered in each of the four quarters of the year 1936, at a price of 1¼ in excess of the price paid by defendant to tanners for such hair; that the contract could have been fully performed within the space of one year from the time it was made; that defendant repudiated the contract in respect of the quantity allocable to the fourth quarter and that plaintiff was obliged to buy on the open market such quantity at prices about 4¢ over that determined by the contract."

Defendant's theory is that no contract or agreement was made in respect to the fourth quarter of 1936, which is the only period in controversy, and that the oral agreement alleged by plaintiff to have been entered into in November, 1935, if made, was void under the Statute of Frauds.

The primary question presented for our determination is whether the finding of the trial court that there was no contract or agreement made by the parties in respect to the fourth quarter of 1936 was manifestly against the weight of the evidence.

Plaintiff is a manufacturer of hair products - chiefly felt for various uses. The plant is located in Detroit. Defendant, whose headquarters are in Chicago, is one of the largest dealers in hair, as well as a manufacturer of hair products which are competitive with those of plaintiff. On May 5, 1931, plaintiff by its written order made its first purchase of felting hair from defendant for

delivery during the year 1934. On November 22, 1934, again by its written order, plaintiff purchased from defendant 3,000,000 pounds of hair (subsequently raised to 4,000,000 pounds) at 3-3/4 cents per pound, to be delivered in "approximately equal monthly shipments between January 1, 1935, and December 31, 1935." The defendant was behind in its deliveries under the contract covering 1935 and by written agreement of the parties on October 10, 1935, the time for the delivery of the hair necessary to complete the contract for that year was extended so that defendant might "make shipment as soon as possible after January 1." All of the hair covered by the contract for 1935 was shipped by the end of February, 1936. Apprehending that the supply of hair would not be sufficient to meet the demand in 1936, a meeting of a number of the leading hair dealers and manufacturers of hair products was called and held at the Bellevue Stratford Hotel in Philadelphia on November 18, 1935, to discuss the raw material outlook for the coming year, the probable needs of the manufacturers and the means of supplying same. At such meeting plaintiff was represented by its President, Sidney J. Allen. Defendant was represented by its president, Theodore Wilde, and by the Chairman of its Board, V. A. Wallin. There were also in attendance Victor Hemphill, President of Hemphill & Company, a dealer, J. J. Densten, President of Densten Hair & Felt Company, a dealer as well as a manufacturer, and Theodore Horwich, Secretary of the General Felt Products Company of Chicago. The concerns represented at the meeting were the principal users and suppliers of hair in this country. All those who participated in the Philadelphia conference testified in this cause except Hemphill, who died shortly before the trial.

Concerning what transpired at the Philadelphia meeting, Allen, plaintiff's president, testified that Mr. Wilde said "the consumption of hair was increasing beyond the production of the hair and it would be to the interest of the individuals to collectively get together and buy our hair together through one particular group, and also to regulate the amount of hair each of the manufacturers would consume during the

delivery during the year 1934. On November 22, 1934, again by its written order, plaintiff purchased from defendant 3,000,000 pounds of hair (subsequently raised to 4,000,000 pounds) at 3-3/4 cents per pound, to be delivered in "approximately equal monthly shipments between January 1, 1935, and December 31, 1935." The defendant was behind in its deliveries under the contract covering 1935 and by written agreement of the parties on October 10, 1935, the time for the delivery of the hair necessary to complete the contract for that year was extended so that defendant might "make shipment as soon as possible after January 1." All of the hair covered by the contract for 1935 was shipped by the end of February, 1936. Apprehending that the supply of hair would not be sufficient to meet the demand in 1936, a meeting of a number of the leading hair dealers and manufacturers of hair products was called and held at the Bellevue Stratford Hotel in Philadelphia on November 12, 1935, to discuss the raw material outlook for the coming year, the probable needs of the manufacturers and the means of supplying same. At such meeting plaintiff was represented by its President, Sidney L. Allen. Defendant was represented by its president, Theodore Wilde, and by the Chairman of its Board, V. A. Wallin. There were also in attendance Victor Humphill, President of Humphill & Company, a dealer, L. L. Denton, President of Denton Hair & Felt Company, a dealer as well as a manufacturer, and Theodore Horwich, Secretary of the General Felt Products Company of Chicago. The concerns represented at the meeting were the principal users and suppliers of hair in this country. All those who participated in the Philadelphia conference testified in this cause except Humphill, who died shortly before the trial.

Concerning what transpired at the Philadelphia meeting, Allen, plaintiff's president, testified that Mr. Wilde said "the consumption of hair was increasing beyond the production of the hair and it would be to the interest of the individuals to collectively get together and buy our hair together through one particular group, and also to regulate the amount of hair each of the manufacturers would consume during the

following year;" that Wilde and Densten stated how much hair they would need; that these amounts were compared with the production anticipated for the following year; that Wilde and Morwich said that they would pare down their production for the following year and that he [Allen] stated that he would do likewise; that he said plaintiff would be content with approximately 6,000,000 pounds; that Wilde said that his company would undertake to deliver 3,000,000 pounds of brown cattle hair and 750,000 pounds of calf hair to plaintiff; that Hemphill said that his company would furnish 1,000,000 pounds of cattle hair and 500,000 pounds of goat hair; that Densten said that his company would furnish 1,000,000 pounds of hair, giving plaintiff approximately 6,000,000 pounds; that "they would furnish, sell us, sell our company that amount of hair *** the price to be determined quarterly, 1¢ per pound differential above that which they paid the tanners, 1¢ average price, which they paid the tanners;" that "Mr. Morwich of the General Felt Company and myself said that we would like to have determined the exact price of the hair;" and that he [Allen] asked "what the price of hair would be for the first quarter;" that "Mr. Wilde said that the price to the tanner at that time was 5-1/2¢ a pound *** the price to us would be for the first quarter 6-1/2¢;" and that Mr. Wilde stated that "they would give us 3,000,000 of brown medium and short brown cattle hair and 750,000 pounds of calf hair *** all domestic cattle hair."

Theodore Morwich testified in plaintiff's behalf that he said at the Philadelphia meeting that his company would use less hair in 1936; that he stated that his company would get along with 4,000,000 pounds; that Hemphill said "that he would sell them 1,000,000 pounds" and Wilde said "that he would sell them 3,000,000 pounds;" that "the same people said they would sell Allen a quantity of hair to be delivered in 1936," but that he did not recall what the quantity was; that "the price was to be 1¢ a pound above their cost *** the same basis as it was sold to us;" that Wilde, Densten and Hemphill said that "the prices were to be determined quarterly;" and that the price for the

following year;" that Wilde and Denegen stated how much hair they would need; that these amounts were compared with the production anticipated for the following year; that Wilde and Hurwich said that they would pare down their production for the following year and that he [Allen] stated that he would do likewise; that he said plaintiff would be content with approximately 6,000,000 pounds; that Wilde said that his company would undertake to deliver 3,000,000 pounds of brown cattle hair and 750,000 pounds of calf hair to plaintiff; that Humphill said that his company would furnish 1,000,000 pounds of cattle hair and 500,000 pounds of goat hair; that Denegen said that his company would furnish 1,000,000 pounds of hair, giving plaintiff approximately 4,000,000 pounds; that "they would furnish, sell us, sell our company that amount of hair *** the price to be determined quarterly, 1¼ per pound differential above that which they paid the tanners, 1¼ average price, which they paid the tanners;" that "Mr. Horwich of the General Felt Company and myself said that we would like to have determined the exact price of the hair;" and that he [Allen] asked "what the price of hair would be for the first quarter;" that "Mr. Wilde said that the price to the tanner at that time was 3-1/2¢ a pound *** the price to us would be for the first quarter 5-1/2¢;" and that Mr. Wilde stated that "they would give us 3,000,000 of brown medium and short brown cattle hair and 750,000 pounds of calf hair *** all domestic cattle hair."

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"first quarter was to be 6-1/2¢."

Wilde, testifying in defendant's behalf, denied that he agreed orally with Allen that defendant would sell to plaintiff 3,750,000 pounds of hair, one quarter of which was to be delivered in each of the four quarters of 1936 and that the price of such hair for the last three quarters of 1936 was to be 1 cent over the average price paid by the defendant to tanners for hair of such kind and quality. He testified that Allen requested an agreement of that kind but that he told him he would not make such a commitment; that he would, however, agree to sell the 937,000 pounds of hair, which Allen requested for the first quarter, at 6-1/2 cents a pound. He further testified that he told Allen, "The American Hair & Felt Company would make every endeavor to supply their customers, including Allen Industries and General Felt, their requirements, but unless they received enough hair for their own requirements as well as for all of their customers including Allen Industries and General Felt they could not sell any quantities except what we promised to give them verbally for the first three months of 1936 and the balance we still owed Allen Industries on the 1935 contract *** I said that any further quantities and prices would have to be set on or after the 1st of April, the 1st of July, and 1st of October of 1936."

John J. Densten, President of the Densten Felt & Hair Company, testified that he attended the conference in Philadelphia; that "the conversation went on as to what the possible requirements might be for the parties there for their manufacturing purposes for the year 1936 *** and each one submitted an estimate of what their possible requirements would be;" that Allen said "he would require approximately six and a half million pounds of hair, brown hair;" that "it was estimated that the production for 1936, considering inventories, that the available supply would be less in 1936 than it was in 1935; and everybody agreed under the circumstances to be satisfied with a lesser amount for 1936 than they had in 1935; and that was agreed upon *** as to price, of course we could only be approximate, and very indefinite; however

"First quarter was to be 6-1/2¢."

Hilde, testifying in defendant's behalf, denied that he agreed orally with Allen that defendant would sell to plaintiff 3,750,000 pounds of hair, one quarter of which was to be delivered in each of the four quarters of 1936 and that the price of such hair for the last three quarters of 1936 was to be 1 cent over the average price paid by the defendant to tanners for hair of such kind and quality. He testified that Allen requested an agreement of that kind but that he told him he would not make such a commitment; that he would, however, agree to sell the 937,000 pounds of hair, which Allen requested for the first quarter, at 6-1/2 cents a pound. He further testified that he told Allen, "The American Hair & Felt Company would make every endeavor to supply their customers, including Allen Industries and General Felt, their requirements, but unless they received enough hair for their own requirements as well as for all of their customers including Allen Industries and General Felt they could not sell any quantities except what we promised to give them verbally for the first three months of 1936 and the balance we still owed Allen Industries on the 1935 contract *** I said that any further quantities and prices would have to be set on or after the 1st of April, the 1st of July, and 1st of October of 1936."

John J. Dowling, President of the Boston Felt & Hair Company, testified that he attended the conference in Philadelphia; that "the conversation went on as to what the possible requirements might be for the parties there for their manufacturing purposes for the year 1936 *** and each one submitted an estimate of what their possible requirements would be;" that Allen said "he would require approximately six and a half million pounds of hair, brown hair;" that "it was estimated that the production for 1936, considering inventories, that the available supply would be less in 1936 than it was in 1935; and everybody agreed under the circumstances to be satisfied with a lesser amount for 1936 than they had in 1935; and that was agreed upon *** as to price, of course we could only be approximate, and very indefinite; however

there was a definite price set for the first three months of the year;" that "we said we would supply him [Allen] with a million pounds of cattle hair and two hundred and twenty-five thousand pounds of goat hair *** we said that the price would be 6-1/2¢ for the first three months of the year, for 25% of that quantity upon the cattle hair and 5-3/4¢ on the goat hair, for 25% of that quantity;" that he did not hear any conversation as to the quantity of hair that defendant would endeavor to furnish to plaintiff during 1936; that he heard nothing said between Allen and Wilde as to price "excepting general conversation;" that "prices were not being fixed for anything except the first quarter; that he furnished plaintiff with hair during the first three months of 1936 - "25% of what we sold him for the year" at a price of "6-1/2¢ for the cattle hair and 5-3/4¢ for the goat hair;" that his company did not sell or deliver to plaintiff any hair after the first three months; and that "we set our prices for the second quarter but he [Allen] would not agree to it *** we just did not ship."

On examination by the trial judge Densten testified that "while he, Wilde and the others were present - future requirements had been talked about - something was said by Wilde or Allen concerning the price of the hair being based upon a differential of 1¢ over that paid us to the tanners;" that that was said "at the time they were trying to figure out what the price would be at the beginning of the year and it was agreed that a legitimate price for the other manufacturers to pay, if they were not buying directly from the tanner, would be 1¢ per pound differential as between what any of us paid the tanner and the f.o.b. price Detroit;" that "Allen paid them 1¢ over the tanner's price that existed in January of 1936;" that the differential of 1 cent "was bearing on the whole year;" that "what was said was that we would go along on that basis for the first three months of the year and any price situation or anything else that came up during the first quarter would be readjusted at the beginning of another quarter."

V. A. Wallin, who attended the meeting in Philadelphia and who was at that time the Chairman of the Board of Directors of defendant,

there was a definite price set for the first three months of the year;"
that "we said we would supply him [Allen] with a million pounds of
cattle hair and two hundred and twenty-five thousand pounds of goat
hair *** we said that the price would be 6-1/2¢ for the first three
months of the year, for 25% of that quantity upon the cattle hair
and 5-3/4¢ on the goat hair, for 25% of that quantity;" that he did
not hear any conversation as to the quantity of hair that defendant
would endeavor to furnish to plaintiff during 1936; that he heard
nothing said between Allen and Wilde as to price "excepting general
conversation;" that "prices were not being fixed for anything except
the first quarter; that he furnished plaintiff with hair during the
first three months of 1936 - "25% of what we sold him for the year"
at a price of "6-1/2¢ for the cattle hair and 5-3/4¢ for the goat hair;"
that his company did not sell or deliver to plaintiff any hair after the
first three months; and that "we set our prices for the second quarter
but he [Allen] would not agree to it *** we just did not ship."

On examination by the trial judge Denson testified that "while
he, Wilde and the others were present - future requirements had been
talked about - something was said by Wilde or Allen concerning the
price of the hair being based upon a differential of 1¢ over that paid
us to the tanners;" that that was said "at the time they were trying to
figure out what the price would be at the beginning of the year and it
was agreed that a legitimate price for the other manufacturers to pay,
if they were not buying directly from the tanner, would be 1¢ per
pound differential as between what any of us paid the tanner and the
f.o.b. price Detroit;" that "Allen paid them 1¢ over the tanner's price
that existed in January of 1936;" that the differential of 1 cent "was
bearing on the whole year;" that "what was said was that we would go
along on that basis for the first three months of the year and any
price situation or anything else that came up during the first quarter
would be readjusted at the beginning of another quarter."

V. A. Wallin, who attended the meeting in Philadelphia and who
was at that time the Chairman of the Board of Directors of defendant,

testified "that Mr. Wilde said that he could not guarantee a large quantity or any quantity for the year 1936, he had his own mills to supply, that he had other customers to take care of and declined to promise the definite large quantity that Mr. Allen wanted to secure from him;" and that "as soon as they began talking price I said to them, 'now, I am not concerned in the price. I am not concerned in quantities. I won't sit in with you on this price situation because I don't know anything about it' *** and these buyers and sellers went into a corner of the room and discussed prices *** I was not a party to that discussion and don't know what the prices were."

As heretofore stated defendant was not able to complete the shipments required under the 1935 contract until the end of February, 1936. Defendant then began to make shipments of the 937,000 pounds of hair it agreed to furnish plaintiff for the first quarter of 1936. Shortly thereafter difficulties arose regarding the slowness of deliveries and the grade of hair delivered. As a result Allen came to Chicago April 28, 1936, and a meeting was held at defendant's office, at which were present Allen, Wilde and Thomas H. Jones, Manager of the Hair Division of defendant. At this meeting samples of hair were examined and the grade of hair to be delivered in the remaining shipments for the first three months of 1936 agreed upon. At that time an agreement was also entered into between the parties for the sale of 937,000 pounds of hair to plaintiff at a price of 7-1/2 cents a pound for the second three months of 1936. The exact terms of this agreement were specified in the following letter of April 28, 1936, from defendant to plaintiff and plaintiff's reply thereto of April 29, 1936:

"Mr. Sidney J. Allen, President,
Allen Industries, Inc.,
Detroit, Michigan.

Dear Mr. Allen:

testified "that Mr. Wilde said that he could not guarantee a large quantity or any quantity for the year 1936, he had his own mills to supply, that he had other customers to take care of and declined to promise the definite large quantity that Mr. Allen wanted to secure from him;" and that "as soon as they began talking price I said to them, 'now, I am not concerned in the price. I am not concerned in quantities. I won't sit in with you on this price situation because I don't know anything about it' *** and these buyers and sellers went into a corner of the room and discussed prices *** I was not a party to that discussion and don't know what the prices were."

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"Mr. Sidney L. Allen, President,
Allen Industries, Inc.,
Detroit, Michigan.

Dear Mr. Allen:

As arranged when you were here today, we are to book you for:

| | |
|---|---|
| 750,000 lbs. Hair | |
| 187,000 " " | 937,000 lbs. |
| To be shipped during the second quarter of this year. We still owe you on account of Hair which should have been shipped you in the first quarter | 460,000 " |
| | 1,397,000 |
| What we sold you of Foreign Hair today and what we are reserving for you of that kind aggregate | 500,000 lbs. |
| | 897,000 " |

The prices to apply are as follows:
We are to ship you at once - 160,000# Foreign Hair
To be shipped from time to time - 300,000# Domestic "
460,000# 6 1/2¢ lb.
(To complete shipments for the first quarter)
On the 340,000 lbs. Foreign which we are to ship you at the rate of one carload of Foreign to two carloads Domestic - and
On the 597,000 lbs. Domestic 7 1/2¢ lb.
f.o.b. cars Detroit in full carload lots.

If for any reason we cannot complete shipments by the end of the second quarter, we are to ship the balance as soon as possible thereafter.

Please acknowledge.

Yours very truly,
American Hair & Felt Company."

"American Hair & Felt Co.
Chicago, Ill.

Gentlemen:

We are in receipt of your letter of the 28th and wish to advise that everything in your letter corresponds with Mr. Allen's understanding except the Domestic Hair is to be all Brown Cattle and samples are to be submitted to us for approval.

Yours very truly,
Allen Industries, Inc."

On July 2, 1936, Allen wrote Wilde the following letter:

"Mr. T. Wilde,
American Hair and Felt Company,
Chicago, Illinois.

Dear Ted:

We are very much interested in knowing what your intentions are in regard to the hair situation for the third quarter.

We are desirous of getting settled on this item at your earliest possible convenience.

With kindest regards, I am

Very truly yours,
Sidney J. Allen, President."

As arranged when you were here today, we are to book you for:

| | |
|---|---|
| 750,000 lbs. Hair | |
| 187,000 " " | 937,000 lbs. |

To be shipped during the second quarter of this year. We still owe you on account of that which should have been shipped you in the first quarter

| | |
|---|---|
| | 440,000 " |
| | 1,377,000 |

What we told you of foreign hair today and what we are receiving for part of that kind shipments

| | |
|---|---|
| | 700,000 lbs. |
| | 677,000 " |

The prices to apply are as follows:
We are to ship you at once - 100,000# foreign hair to be shipped from time
to time - 300,000# domestic "
400,000# @ 1 1/2¢ lb.
(To complete shipments for the first quarter)
On the 340,000 lbs. foreign which we are
to ship you at the rate of one hundred of
foreign to two carloads domestic - and
On the 377,000 lbs. Domestic @ 1 1/2¢ lb.
f.o.b. cars Detroit in full carload lots.

If for any reason we cannot complete shipments by the end of the second quarter, we are to ship the balance as soon as possible thereafter.

Please acknowledge.

Yours very truly,
American Hair & Felt Company."

"American Hair & Felt Co.
Chicago, Ill.

Gentlemen:

We are in receipt of your letter of the 27th and wish to advise that everything in your letter correspondes with Mr. Allen's understanding except the domestic hair is to be all brown textile and samples are to be submitted to us for approval.

Yours very truly,
Allen Industries, Inc."

On July 2, 1946, Allen wrote with the following letter:

"Mr. T. Wilde,
American Hair and Felt Company,
Chicago, Illinois.

Dear Ted:

We are very much interested in knowing what your intentions are in regard to the hair situation for the third quarter.

We are desirous of getting settled on this item at your earliest possible convenience.

With kindest regards, I am

Very truly yours,
Sidney L. Allen, President."

Pursuant to this letter a conference was arranged in Chicago On July 22, 1936, between Allen and Wilde, the result of which was recorded in the following correspondence between the parties:

"July 22, 1936.

Mr. Sidney J. Allen, President,
Allen Industries, Inc.
Detroit, Michigan.

Dear Mr. Allen:

As per our conversation in this office today, we have booked your order for

750,000 lbs. Cattle Hair

and

187,000 " Calf Hair

Total 937,000

to be shipped to you in the third quarter of 1936 at a price of 7 1/2¢ per lb.
f.o.b. cars Detroit, in full carload lots.
We still owe you

294,406 lbs. Domestic Hair

and

107,317 lbs. Foreign Hair

which is the balance due on contract made with you as per our letter of April 28, 1936.

It is further understood that if for any reason we cannot complete shipments by the end of the third quarter of the above specified quantities, we will ship the balance as soon as possible thereafter.

Will you please acknowledge this letter?

Very truly yours,
T. Wilde
President
American Hair & Felt Company."

"July 23, 1936.

Mr. T. Wilde,
American Hair and Felt Company,
Chicago, Illinois.

Dear Ted:

Thanks very kindly for the courtesies extended to me yesterday.

We wish to confirm your letter of the twenty-second, and according to the writers understanding the 750,000 pounds of cattle hair is to be brown domestic hair.

With kindest personal regards, I am

Very truly yours,
Sidney J. Allen,
President."

In August, 1936, plaintiff made a series of complaints regarding shipments of foreign hair and as a result of said complaints Wilde conferred with Allen at the latter's office in Detroit on August 26,

Pursuant to this letter a conference was arranged in Chicago On July 22, 1936, between Allen and Wilde, the result of which was recorded in the following correspondence between the parties:

"July 22, 1936.

Mr. Sidney J. Allen, President,
Allen Industries, Inc.
Detroit, Michigan.

Dear Mr. Allen:

As per our conversation in this office today, we have booked your order for

| | |
|---|---|
| | 750,000 lbs. Cattle Hair |
| and | |
| | 187,000 " Calf Hair |
| Total | 937,000 |

to be shipped to you in the third quarter of [illegible] at a price of f.o.b. cars Detroit, in full carload lots.
7 1/2¢ per lb.
We still owe you

| | |
|---|---|
| | 294,406 lbs. Domestic Hair |
| and | |
| | 107,117 lbs. Foreign Hair |

which is the balance due on contract made with you as per our letter of April 28, 1936.

It is further understood that if for any reason we cannot complete shipments by the end of the third quarter of the above specified quantities, we will ship the balance as soon as possible thereafter.

Will you please acknowledge this letter?

Very truly yours,
T. Wilde
President
American Hair & Felt Company."

"July 23, 1936.

Mr. T. Wilde,
American Hair and Felt Company,
Chicago, Illinois.

Dear Ted:

Thanks very kindly for the courtesies extended to me yesterday.

We wish to confirm your letter of the twenty-second, and accordingly the writer, representing the 775,000 pounds of cattle hair is to be known domestic hair.

With kindest personal regards, I am

Very truly yours,
Sidney J. Allen,
President."

In August, 1936, plaintiff made a series of complaints regarding shipments of foreign hair and as a result of said complaints Wilde conferred with Allen at the latter's office in Detroit on August 26,

1936. As will be hereafter shown this Detroit meeting of August 26, 1936, furnished in large measure the basis of plaintiff's original complaint.

There is a direct conflict in the testimony as to what actually occurred and as to what was said by those present at the meeting in Philadelphia in November, 1935. The testimony of Allen is contradicted in all material respects by the testimony of Wilde. Allen stated that he and Wilde entered into an oral agreement at said meeting that defendant would furnish plaintiff 3,750,000 pounds of hair during the year 1936, 937,000 pounds of which would be ascribable to each quarter of said year at a price of 6-1/2 cents a pound for the first quarter, the price for the succeeding quarters to be "the average price paid by defendant to tanners for hair of such kind or quality plus 1¢ per pound." On the other hand Wilde testified that the extent of his oral agreement with Allen at the Philadelphia meeting was that defendant would deliver to plaintiff 937,000 pounds of hair during the first quarter of 1936 at 6-1/2 cents a pound.

In substantiation of his claim that the price fixed by the parties in the alleged oral agreement for the year 1936 was one cent per pound above the average price paid by defendant to tanners for the last three quarters of the year Allen testified that on the occasion of his conference with Wilde on April 28, 1936, in defendant's office, "I asked Mr. Wilde what the price of hair would be for the second quarter. Mr. Wilde called in somebody from the bookkeeping department, and in front of me, asked them what the average price was that they were paying at that time from the tanners. The bookkeeper - his name I do not know - stated they were paying six and one-half cents per pound. Mr. Wilde in turn gave us a price of seven and one-half cents per pound on hair for our second quarter." He testified further that at the conference between himself and Wilde on July 22, 1936, when the contract was made for the sale of hair by defendant to plaintiff for the third quarter of 1936, "I again inquired the price on it for the third quarter. Mr. Wilde stated there had been no

1936. As will be hereafter shown this Detroit meeting of August 26, 1936, furnished in large measure the basis of plaintiff's original complaint.

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In substantiation of his claim that the price fixed by the parties in the alleged oral agreement for the year 1936 was one cent per pound above the average price paid by defendant to tanners for the last three quarters of the year Allen testified that on the occasion of his conference with Wilde on April 29, 1936, in defendant's office, "I asked Mr. Wilde what the price of hair would be for the second quarter. Mr. Wilde called in somebody from the bookkeeping department, and in front of me, asked them what the average price was that they were paying at that time from the tanners. The bookkeeper - his name I do not know - stated they were paying six and one-half cents per pound. Mr. Wilde in turn gave us a price of seven and one-half cents per pound on hair for our second quarter." He testified further that at the conference between himself and Wilde on July 22, 1936, when the contract was made for the sale of hair by defendant to plaintiff for the third quarter of 1936, "I again inquired the price on it for the third quarter. Mr. Wilde stated there had been no

change in the tannery price, and the price would be seven and one-half cents to me for the third quarter."

Wilde, testifying in reference to the conversation between himself and Allen on April 28, 1936, stated that he did not "call in anyone and ask them what the price was - what prices were being paid to tanners; that no one came in and told him in that conference that the price being paid to tanners was 6-1/2¢," but that he did agree with Allen at that conference that the price for the second quarter would be 7-1/2 cents. He also testified that in the conference with Allen on July 22, 1936, which culminated in the contract to furnish plaintiff with hair for the third quarter, he discussed with Allen "the hair situation in general, the acute shortage of hair, also further sale to him of 937,000 pounds of cattle and calf hair at a fixed price of 7-1/2¢;" that he did not tell Allen on that occasion "that there had been no change in the price to tanners and the price would be 7-1/2¢;" that "I only told him the price was 7-1/2¢ per pound *** I did not tell him that the price to the tanners was 6-1/2¢," and that Allen did not inquire "what the price to the tanners was."

The testimony of Densten and Morwich corroborated that of Allen to some extent as to the general trend of the conversation at the Philadelphia meeting, both in respect to the agreement made there being for the year 1936 and in respect to the price to be charged for the hair for the last three quarters of that year. However, Densten, Morwich and Wallin all testified that they did not know what actual agreement was reached between Allen and Wilde.

In view of the sharp conflict in the testimony of the witnesses, the documentary evidence in the record unquestionably became a decisive factor with the trial court in its consideration and determination of the factual issues presented. "Where there is such a direct conflict in the oral testimony, documentary evidence, like the correspondence between the parties, becomes of paramount importance. Such evidence, if pertinent, is controlling, since it is the best evidence and in every way more satisfactory and convincing than the recollection of

change in the tannery price, and the price would be seven and one-half cents to me for the third quarter."

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The testimony of Denston and Norwick corroborated that of Allen to some extent as to the general trend of the conversation at the Philadelphia meeting, but in regard to the agreement made later for the year 1936 and in respect to the price to be charged for the hair for the last three quarters of that year. However, Denston, Norwick and Wallin all testified that they did not know what actual agreement was reached between Allen and Wilde.

In view of the sharp conflict in the testimony of the witnesses, the documentary evidence in the record unquestionably became a decisive factor with the trial court in its consideration and determination of the factual issues presented. Where there is such a direct conflict in the oral testimony, documentary evidence, like the correspondence between the parties, becomes of paramount importance. Such evidence, if pertinent, is controlling, since it is the best evidence and in every way more satisfactory and convincing than the recollections of

witnesses as to conversations which occurred more than two years before." Toppan v. McLaughlin, 120 Fed. 705.

Subsequent to the meeting in Philadelphia in November, 1935, plaintiff or Allen forwarded fifteen letters to Wilde or defendant concerning hair purchased by plaintiff from defendant for delivery in 1936 and in not a single one of them is there any reference made to the oral agreement claimed by plaintiff to have been entered into with defendant covering the purchase and sale of hair for the entire year 1936. Neither was any reference to a contract covering the year 1936 contained in any of the eleven letters in the record from Wilde or defendant to Allen or plaintiff. Even in the letter written by Allen to Wilde on November 25, 1936, which marked the break in the relations between the parties, there is not even a suggestion of an agreement covering the entire year. The following passage is found in this letter:

> "On August 26th, you visited our office and explicitly stated that due to market conditions you could not reduce the price of hair for the last quarter and would continue on the same basis of price which you were then furnishing us, namely, 7-1/2 per pound.
>
> "Does it seem possible to you that we would wait until the last month of the last quarter of the year to determine a price for the last quarter shipments."

The foregoing language indicates that plaintiff placed its dependence for its supply of hair for the last quarter of 1936 at 7-1/2 cents per pound upon the asserted agreement of August 26, 1936, rather than upon the alleged oral agreement for a year, which it now contends was entered into by the parties at the meeting in Philadelphia in November, 1935. Wilde's reply of November 27, 1936, to Allen's letter of November 25, 1936, is in part as follows:

> "Under no circumstances have I ever gone on record to assure you hair for the last quarter of 1936 and stipulated a price at which the hair would be delivered to you. It is entirely out of the question that, as you state, on August 26th I would have been in a position to quote you a price that would be effective on or after October 1st. Conditions at that time certainly did not warrant us in setting a price so far ahead."

There certainly is nothing in the language used by Wilde in this letter to indicate that defendant felt that it was burdened with a contract to deliver hair to plaintiff during the last quarter of 1936.

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There certainly is nothing in the language used by Wilde in this letter to indicate that defendant felt that it was burdened with a contract to deliver hair to plaintiff during the last quarter of 1936.

Wilde's letter to Allen of April 28, 1936, and Allen's reply thereto, heretofore set forth, constituted a written contract between the parties whereby defendant was to furnish plaintiff with hair for the second quarter of 1936. It will be noted that this contract was complete in itself as to quantity, quality, price and terms of shipment and that the language used in Wilde's letter imports a contract of sale as of the date of this letter. There is no reference in either of the letters as to an oral agreement covering the year 1936.

It will also be noted that in Allen's letter to Wilde of July 2, 1936, he stated that "we are very much interested in knowing what your intentions are in regard to the hair situation for the third quarter. We are desirous of getting settled on this item at your earliest convenience." There is nothing in this letter to indicate that there was an oral agreement for the year 1936, which would, of course, include the third quarter thereof. Nothing was said in this letter as to price. If defendant was already obligated to furnish the Allen Company with hair for the third quarter on the cost-plus basis as plaintiff now claims, why the anxiety to get the hair situation "settled" for that quarter?

Wilde and Allen, as already shown, did enter into a written contract by their respective letters of July 22, 1936, and July 23, 1936, under the terms of which defendant agreed to furnish plaintiff with hair during the third quarter of the year. This contract was also complete as to quantity, quality, price and terms of shipment. It is significant that no reference was made in the correspondence constituting this contract to an oral agreement between the parties for a year's supply of hair. Wilde's letter to Allen stating the terms of this contract does refer however to "contract made with you as per our letter of April 28, 1936," in connection with uncompleted deliveries of hair due in the previous quarter.

One of the essential elements of any enforceable contract of sale is that of price. It will be recalled that plaintiff's present theory as set forth in the amendment filed to its complaint at the

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close of all the evidence is that the price stipulated in the oral agreement alleged to have been entered into between the parties at the Philadelphia meeting in November, 1935, was one cent a pound over the average price paid by the defendant to tanners for hair ascribable to the last three quarters of the year 1936. Allen's testimony was in conformity to this theory. In this connection it is pertinent to examine prior pleadings filed by plaintiff in this cause. In its original complaint it alleged that a price of 6-1/2 cents a pound was agreed to for the hair ascribable to the first quarter and that "the price of the hair to be delivered the succeeding quarters of the year 1936 should be such sum as was thereafter agreed to between the plaintiff and the said defendant;" and that "on August 26, 1936, plaintiff and defendant agreed that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2 cents per pound." These allegations as to the manner in which the price was to be determined and as to the agreement of August 26, 1936, fixing the price at 7-1/2 cents for the third and fourth quarters were realleged in plaintiff's verified answer filed herein to defendant's counterclaim. The same allegations were also made in a sworn answer filed by plaintiff in a suit brought against it by defendant in Delaware to recover on the same claim asserted in the counterclaim.

In the face of the written agreement of the parties of July 22, 1936, covering the third quarter, plaintiff was, of course, forced to abandon the position taken in its original complaint that a price of 7-1/2 cents a pound for the third and fourth quarters was agreed to on August 26, 1936. Notwithstanding plaintiff's cost-plus theory as to price set forth in the amendment to its complaint and the statement in its brief that it is on that theory it relies, strange to say, said amendment also contains the allegation that "on August 26, 1936, defendant stated to plaintiff that the price of the hair ascribable to the fourth quarter of the year 1936 would be 7-1/2 cents per pound." It will be noted that in this allegation the alleged agreement of August 26, 1936, purported to fix the price for the fourth quarter only

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In the face of the written agreement of the parties of July 22, 1936, covering the third quarter, plaintiff was, of course, forced to abandon the position taken in its original complaint that a price of 7-1/2 cents a pound for the third and fourth quarters was agreed to on August 26, 1936. Notwithstanding plaintiff's cost-plus theory as to price set forth in the amendment to its complaint and the statement in its brief that it is on that theory it relies, strange to say, said amendment also contains the allegation that "on August 26, 1936, defendant stated to plaintiff that the price of the hair ascribable to the fourth quarter of the year 1936 would be 7-1/2 cents per pound."

It will be noted that in this allegation the alleged agreement of August 26, 1936, purported to fix the price for the fourth quarter only

and not for the third and fourth quarters as alleged in the original complaint. It should also be remembered that Allen in his letter to Wilde of November 25, 1936, stated that Wilde had agreed on the occasion of the meeting on August 26, 1936, to furnish plaintiff with hair for the fourth quarter at 7-1/2 cents a pound. Plaintiff urges that the several theories as to price advanced by it in its various pleadings are reconcilable in that on the occasions when the price was fixed it was determined on the basis of the price paid by defendant to the tanners. This argument is refuted by the documentary evidence in the record, as well as by the admission contained in the allegation in plaintiff's earlier pleadings that the price of the hair for the last three quarters should be such sum as the parties agreed upon. Plaintiff's original price theory made absolutely no reference to tannery prices or average tannery prices paid by defendant.

While the price theory advanced by plaintiff in its earlier pleadings did not conclude it from thereafter advancing another and entirely different theory as to this essential element of the alleged oral agreement, the allegations heretofore pointed out in such prior pleadings may be considered as admissions affecting the credibility of Allen, who was the only representative of plaintiff who was familiar with the facts and who it must be presumed related the facts to the attorneys who prepared said pleadings, as well as the answer filed in the Delaware case. Such sworn admissions alone are sufficient to cast suspicion on the merits of plaintiff's claim. In Joyce v. Humbird, 78 Fed. (2d) 386 (C.C.A. 7th), in passing upon admissions against interest made in a sworn answer, the court said at p. 389:

"*** appellants' sworn answer contained the following allegation:

"'Said Humbird represented to defendant that Clearwater Timber Company owned in excess of four billion feet of timber, more than 50% of which was white pine of good quality.'

"It is quite inconceivable that appellants, when seeking to avoid the possibility of a large money judgment by charging fraud as a defense, should assert in their pleadings that the false representation was that 'more than 50% of the timber was white pine' when in fact said representation was that 60% to 75% of the timber was white pine. ***"

and not for the third and fourth quarters as alleged in the original complaint. It should also be remembered that Allen in his letter to Wilde of November 27, 1936, stated that Wilde had agreed on the occasion of the meeting on August 26, 1936, to furnish plaintiff with hair for the fourth quarter at 7-1/2 cents a pound. Plaintiff urges that the several theories as to price advanced by it in its various pleadings are reconcilable in that on the occasions when the price was fixed it was determined on the basis of the price paid by defendant to the tanners. This argument is refuted by the documentary evidence in the record, as well as by the admission contained in the allegation in plaintiff's earlier pleadings that the price of the hair for the last three quarters should be such sum as the parties agreed upon. Plaintiff's original price theory made absolutely no reference to tannery prices or average tannery prices paid by defendant.

While the price theory advanced by plaintiff in its earlier pleadings did not conclude it from thereafter advancing another and entirely different theory as to this essential element of the alleged oral agreement, the allegations heretofore pointed out in such prior pleadings may be considered as admissions affecting the credibility of Allen, who was the only representative of plaintiff who was familiar with the facts and who it must be presumed related the facts to the attorneys who prepared said pleadings, as well as the answer filed in the Delaware case. Such sworn admissions alone are sufficient to cast suspicion on the merits of plaintiff's claim. In Joyce v. Humphrey 78 Fed. (2d) 386 (C.C.A. 7th), in passing upon admissions against interest made in a sworn answer, the court said at p. 389:

> "*** appellants' sworn answer contained the following allegation:
>
> "'Said Humphrey represented to defendant that Clearwater Timber Company owned in excess of four million feet of timber, more than 50% of which was white pine of good quality.'
>
> "It is quite inconceivable that appellants, when seeking to avoid the possibility of a large money judgment by charging fraud as a defense, should assert in their pleadings that the false representation was that 'more than 50% of the timber was white pine,' when in fact said representation was that 50% to 70% of the timber was white pine. ***"

"It is possible but most unlikely that counsel, in ascertaining the fraudulent representations made by Humbird upon which he was to base the fraud charge, misunderstood Joyce and the misrepresentation was 60% to 75% of white pine instead of 50% as stated in the answer. It is also possible, but we think quite unlikely, that such pleading when sworn to by Joyce was by him not understood. On the other hand, the court might well assume that counsel who drew appellants' pleadings obtained his facts from his clients; that the clients, when they signed their answers and counterclaims and under oath asserted the truth of the statements therein appearing, were in fact speaking the truth, and that the testimony subsequently given by said clients was at variance with the facts."

We are impelled to hold that the trial court properly found the issues in favor of defendant and that no adequate reason has been shown why the judgment should be disturbed.

We also think that the alleged oral agreement, upon which plaintiff relies, could not have been completely performed, according to its terms, within one year from the making thereof and that it is therefore void under the Statute of Frauds of Michigan, the state wherein it was to be performed.

In the view we take of this case we deem it unnecessary to discuss the other points urged.

For the reasons stated herein the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

"It is possible but most unlikely that counsel, in assertaining the fraudulent representations made by insider upon which he was to base the fraud charge, misunderstood Joyce and the misrepresentation was not to 7/8 of which the instead of 5/8 as stated in the answer. It is also possible, but we think quite unlikely, that such pleading when sworn to by Joyce was by him misunderstood. On the other hand, the court might well assume that counsel who drew appellants' pleadings obtained his facts from his clients; that the clients, when they signed their answers and counterclaims and under oath, assented the truth of the statements contained appearing, were in fact speaking the truth, and that the testimony subsequently given by said clients was at variance with the facts."

We are impelled to hold that the trial court properly found the issues in favor of defendant and that no adequate reason has been shown why the judgment should be disturbed.

We also think that the alleged oral agreement, upon which plaintiff relies, could not have been completely performed, according to its terms, within one year from the making thereof and that it is therefore void under the statute of frauds of Michigan, the state wherein it was to be performed.

In the view we take of this case we deem it unnecessary to discuss the other points raised.

For the reasons stated herein the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend and Keenan, JJ., concur.

40912

HENNING E. JOHNSON,
Appellee,

v.

CHICAGO CITY BANK & TRUST COMPANY, a corporation, as trustee under Trust No. 2524, JOSEPH H. OPTNER, ROYAL INDEMNITY COMPANY, a corporation, et al.
Defendants.

ON APPEAL OF CHICAGO CITY BANK & TRUST COMPANY, a corporation, as trustee under Trust No. 2524,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

12A

305 I.A. 621

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Henning E. Johnson, filed his complaint against the Chicago City Bank & Trust Company, as trustee, and others, as defendants, for the foreclosure of a receiver's certificate, which had been issued to him in a prior proceeding for the partial foreclosure of a trust deed prosecuted for the benefit of the holder of subordinated bonds and interest coupons. The trial in the instant case resulted in a decree of foreclosure in favor of plaintiff, from which the Chicago City Bank & Trust Company has perfected this appeal. No point has been raised on the pleadings which consist of the complaint of Henning E. Johnson and the answer of the Chicago City Bank & Trust Company, as trustee.

On June 15, 1928, Wollenberger & Co., a corporation, made a loan of $200,000 to one Henry and Elizabeth Lutz, evidenced by a bond issue of 460 bonds of various denominations, maturing consecutively over a period of ten years. The bonds, which were sold to the public, bore interest at the rate of 6% per annum, payable semi-annually, and were secured by a trust deed conveying to John J. Rahlf, an officer of Wollenberger & Co., as trustee, the property involved in this proceeding, which consists of two lots located at the southeast corner of South Chicago and Stony Island avenues and

No. 21.

HENRING E. JOHNSON,
Appellant,

v.

CHICAGO CITY BANK & TRUST COMPANY,
a corporation, as trustee under
trust No. 2524, Henry H. Ottens,
ROYAL INDEMNITY COMPANY, a corporation,
et al.

Defendants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

ON APPEAL OF CHICAGO CITY BANK & TRUST
COMPANY, a corporation, as trustee
under Trust No. 2524,
Appellees.

MR. PRESIDING JUSTICE MULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Henning E. Johnson, filed his complaint against the Chicago City Bank & Trust Company, as trustee, and others, as defendants, for the foreclosure of a receiver's certificate, which had been issued to him in a prior proceeding for the partial foreclosure of a trust deed prosecuted for the benefit of the holder of subordinated bonds and interest coupons. The trial in the instant case resulted in a decree of foreclosure in favor of plaintiff, from which the Chicago City Bank & Trust Company has perfected this appeal. No point has been raised on the pleadings which consist of the complaint of Henning E. Johnson and the answer of the Chicago City Bank & Trust Company, as trustee.

On June 15, 1928, Wollenberger & Co., a corporation, made a loan of $200,000 to one Henry and Elizabeth Ihrs, evidenced by a bond issue of 460 bonds of various denominations, maturing consecutively over a period of ten years. The bonds, which were sold to the public, bore interest at the rate of 6% per annum, payable semi-annually, and were secured by a trust deed conveying to John J. Hahlt, an officer of Wollenberger & Co., as trustee, the property involved in this proceeding, which consists of two lots located at the southeast corner of South Chicago and Stony Island avenues and

79th street, Chicago. The premises are improved with two buildings, one a two-story brick and concrete restaurant building containing three public dining rooms and three private dining rooms and the other a one-story brick and terra cotta gasoline and automobile service station.

On July 1, 1929, the mortgagors defaulted in the payment of a balance of $1,000 due on interest coupons Series 2, and on January 1, 1930, defaulted in the payment of the entire amount due on interest coupons Series 3, aggregating $6,000.

On May 17, 1930, Wollenberger & Co., which had acquired the unpaid interest coupons of Series 2 and 3 aggregating $7,000, filed its bill of complaint in the Superior court of Cook county, as case No. 518012, for the express purpose of foreclosing the lien of the trust deed for the balance due on interest coupons Series 2 and 3, subject to the continuing lien of the same trust deed as security for the payment of the remaining unmatured indebtedness evidenced by the principal bonds and by interest coupons Series 4 to 10, both inclusive. This bill of complaint was joined in by Rahlf, the trustee, as a cocomplainant, for the sole and exclusive benefit of Wollenberger & Co. as the owner of the defaulted interest coupons.

On May 20, 1930, an order was entered in that proceeding upon the application of Wollenberger & Co. and Rahlf, as trustee, appointing a receiver to collect the rents, issues and profits from the premises for the benefit of Wollenberger & Co.

Subsequent to the institution of that subordinate foreclosure proceeding, Wollenberger & Co. acquired interest coupons Series Nos. 4 and 5, which had respectively matured on July 1, 1930, and on January 1, 1931, and acquired principal bonds Nos. 1 to 10, both inclusive, aggregating $10,000, which matured on July 1, 1930, and subordinated these interest coupons and principal bonds to the continuing lien of the trust deed as security for the payment of the remaining unmatured indebtedness of $190,000 evidenced by principal bonds Nos. 11 to 460, both inclusive, and interest coupons Series 6 to 10, both inclusive.

On August 26, 1930, Rahlf wrote a letter to Optner, the receiver

79th street, Chicago. The premises are improved with two buildings, one a two-story brick and concrete restaurant building containing three public dining rooms and three private dining rooms and the other a one-story brick and terra cotta gasoline and automobile service station.

On July 1, 1929, the mortgagors defaulted in the payment of a balance of $1,500 due on interest coupons Series 2, and on January 1, 1930, defaulted in the payment of the entire amount due on interest coupons Series 3, aggregating $4,[illegible].

On May 17, 1930, Wollenberger & Co., which had acquired the unpaid interest coupons of Series 2 and 3 aggregating $7,000, filed its bill of complaint in the Superior court of Cook county, as case No. 31801[illegible], for the express purpose of foreclosing the lien of the trust deed for the balance due on interest coupons Series 2 and 3, subject to the continuing lien of the same trust deed as security for the payment of the remaining unmatured indebtedness evidenced by the principal bonds and by interest coupons Series 4 to 10, both inclusive. This bill of complaint was joined in by Nahlf, the trustee, as a complainant, for the sole and exclusive benefit of Wollenberger & Co. as the owner of the defaulted interest coupons.

On May 20, 1930, an order was entered in that proceeding upon the application of Wollenberger & Co. and Nahlf, as trustee, appointing a receiver to collect the rents, issues and profits from the premises for the benefit of Wollenberger & Co.

Subsequent to the institution of that subordinate foreclosure proceeding, Wollenberger & Co. acquired interest coupons Series Nos. 4 and 5, which had respectively matured on July 1, 1929, and on January 1, 1931, and acquired principal bonds Nos. 1 to 10, both inclusive, aggregating $10,000, which matured on July 1, 1930, and subordinated these interest coupons and principal bonds to the continuing lien of the trust deed as security for the payment of the remaining unmatured indebtedness of $190,000 evidenced by principal bonds Nos. 11 to 460, both inclusive, and interest coupons Series 6 to 10, both inclusive;

On August 26, 1930, Nahlf wrote a letter to Oyster, the receiver

who had been appointed in the partial foreclosure proceeding, directing him to enter into a contract with the plaintiff herein for remodeling of the main building on the property in question. Rahlf agreed in his letter to purchase the receiver's certificates issued in payment of the work and further agreed that if such certificates were not issued, he would pay for the work himself and would indemnify the receiver against any liability.

On October 7, 1930, an order was entered in that case on the petition of Optner, as receiver, authorizing him to expend $3,300 as the cost of the proposed alterations and remodeling which included the installation of a dance floor and a new orchestra pit. This order also authorized Optner to issue receiver's certificates not to exceed the sum of $3,300 in payment of the work and provided that the certificates were to be a first and prior lien upon the rents and income to be received by him as receiver from the property in question and were to be paid out of the rents and income when the same should be received by him as receiver for and during a period of two years from the date of the order.

On October 29, 1930, Optner issued to Johnson, the plaintiff herein, a receiver's certificate in the sum of $3,300 in the form designated in a subsequent order entered on the same day. The certificate provided, inter alia, that it was issued in accordance with the order of October 7th and that it was a first and prior lien on the rents and income received by the receiver, superior to the rights of all parties in the junior proceeding identified as case No. 518012 and also to the rights of all parties in case No. 518341. Case No. 518341, which is not involved in any way in this appeal, was a chancery proceeding for the foreclosure of a chattel mortgage on certain personal property located on the premises.

On July 7, 1931, a decree was entered in that proceeding (case No. 518012) providing for the partial foreclosure of the trust deed as security for the subordinated principal bonds and interest coupons which had been acquired by Wollenberger & Co., and for the costs of the proceeding, and directed a sale of the premises for the benefit

who had been appointed in the partial foreclosure proceeding, directing him to enter into a contract with the plaintiff herein for remodeling of the main building on the property in question. Hahlt agreed in his letter to purchase the receiver's certificates issued in payment of the work and further agreed that if such certificates were not issued, he would pay for the work himself and would indemnify the receiver against any liability.

On October 7, 1930, an order was entered in that case on the petition of Optner, as receiver, authorizing him to expend $3,300 as the cost of the proposed alterations and remodeling which included the installation of a dance floor and a new orchestra pit. This order also authorized Optner to issue receiver's certificates not to exceed the sum of $3,300 in payment of the work and provided that the certificates were to be a first and prior lien upon the rents and income to be received by him as receiver from the property in question and were to be paid out of the rents and income when the same should be received by him as receiver for and during a period of two years from the date of the order.

On October 29, 1930, Optner issued to Johnson, the plaintiff herein, a receiver's certificate in the sum of $3,300 in the form designated in a subsequent order entered on the same day. The certificate provided, later also, that it was issued in accordance with the order of October 7th and that it was a first and prior lien on the rents and income received by the receiver, superior to the rights of all parties in the junior proceeding identified as case No. 31B012 and also to the rights of all parties in case No. 31B341. Case No. 31B341, which is not involved in any way in this appeal, was a chancery proceeding for the foreclosure of a chattel mortgage on certain personal property located on the premises.

On July 7, 1931, a decree was entered in that proceeding (case No. 31B012) providing for the partial foreclosure of the trust deed as security for the subordinated principal bonds and interest coupons which had been acquired by Wollenberger & Co., and for the costs of the proceeding, and directed a sale of the premises for the benefit

of Wollenberger & Co.

On August 5, 1931, the premises were sold for $20,000 at a master's sale held pursuant to the decree, leaving a deficiency due Wollenberger & Co. of $16,591.26. The master's sale was approved on August 25, 1931.

During the pendency of this partial foreclosure proceeding principal bonds Nos. 11 to 20, both inclusive, and interest coupons Series 6, which matured on July 1, 1931, went into default. Robert H. Wollenberger, as successor trustee (Mahlf having resigned), thereupon elected to declare the balance of the principal indebtedness of $190,000 secured by the trust deed due and payable and on October 22, 1931, and filed his bill of complaint in the Superior court of Cook county as case No. 545437 for the complete foreclosure of the lien of the trust deed for the benefit of the holders of principal bonds Nos. 11 to 460, both inclusive, and interest coupons Series 6, together with accrued interest.

On November 27, 1931, the successor trustee, as the representative of the holders of the unsubordinated bonds and interest coupons, in order to preserve the income from the property for their benefit, procured the entry of an order in the junior proceeding (case No. 518012) extending the receivership to the complete senior foreclosure proceeding.

On May 13, 1936, a decree of foreclosure was entered in the latter proceeding (case No. 545437), pursuant to which a master's sale was held on June 30, 1937. The sale was subsequently confirmed and a master's certificate of sale was issued to one Harold C. Bull.

On October 1, 1938, after the expiration of the statutory period of redemption from the master's sale in Superior court case No. 545437, a master's deed was issued to one William E. Fisher as assignee of Harold C. Bull, and thereafter a deed in trust was executed by William E. Fisher conveying title to the property in question to the present owner, the defendant, Chicago City Bank & Trust Company as trustee under its Trust No. 2524.

On March 24, 1939, plaintiff filed his complaint in this

of Mollenhoerger & Co.

On August 5, 1931, the premises were sold for $30,000 at a master's sale held pursuant to the decree, leaving a deficiency due Mollenhoerger & Co. of $16,591.26. The master's sale was approved on August 25, 1931.

During the pendency of this partial foreclosure proceeding principal bonds Nos. 11 to 20, both inclusive, and interest coupons Series 6, which matured on July 1, 1931, went into default. Robert H. Mollenhoerger, as successor trustee (hereinafter referred to as "trustee"), upon elected to declare the balance of the principal indebtedness of $190,000 secured by the trust deed due and payable and on October 22, 1931, and filed his bill of complaint in the Superior court of Cook county as case No. 574437 for the complete foreclosure of the lien of the trust deed for the benefit of the holders of principal bonds Nos. 11 to 400, both inclusive, and interest coupons Series 6, together with accrued interest.

On November 27, 1931, the successor trustee, as the representative of the holders of the coupon-attached bonds and interest coupons, in order to preserve the income from the property for their benefit, procured the entry of an order in the junior proceeding (case No. 31B012) extending the receivership to the complete senior foreclosure proceeding.

On May 13, 1936, a decree of foreclosure was entered in the latter proceeding (case No. 574437), pursuant to which a master's sale was held on June 30, 1937. The sale was subsequently confirmed and a master's certificate of sale was issued to one Harold C. Bull.

On October 1, 1938, after the expiration of the statutory period of redemption from the master's sale in Superior court case No. 574437, a master's deed was issued to one William E. Fisher as assignee of Harold C. Bull, and thereafter a deed in trust was executed by William E. Fisher conveying title to the property in question to the present owner, the defendant, Chicago City Bank & Trust Company as trustee under its Trust No. 25234.

On March 24, 1939, plaintiff filed its complaint in this

case alleging that he is the owner of a receiver's certificate which had been issued to him in the junior foreclosure proceeding of the subordinated bonds; that the issuance of the certificate had been authorized by Rahlf, the first mortgage trustee, by the letter heretofore referred to from Rahlf to Optner, the receiver in said proceeding; that there is a balance of $1,800 due him on said certificate, together with interest at 6% per annum from October 29, 1930; that the title of the defendant, Chicago City Bank & Trust Company, which was derived through the foreclosure sale held pursuant to the decree entered in the subsequent complete foreclosure of the unsubordinated bonds, is subject to the lien of the receiver's certificate; and that plaintiff is entitled to a reasonable allowance for his attorneys' fees. The complaint concluded with a prayer for an accounting, the appointment of a receiver, a sale of the property in question in satisfaction of the amount found to be due plaintiff and a deficiency judgment.

The defendant, Chicago City Bank & Trust Company, as trustee, filed an answer denying that the receiver's certificate was a lien on either the rents accruing from or on the fee title to the property involved, and alleged in detail the facts hereinbefore set forth concerning the subsequent complete foreclosure of the unsubordinated bonds after the receiver's certificate had been issued in the partial foreclosure proceeding, the entry of the decree in the complete foreclosure proceeding, the sale held pursuant thereto and the issuance of the master's deed upon the expiration of the period of redemption. The answer also denied that Rahlf as trustee had authority in the junior foreclosure proceeding to bind the holders of the unsubordinated and unmatured bonds and prayed for the entry of a decree dismissing plaintiff's complaint for want of equity.

Since substantially all the material facts alleged in the complaint, except the authority of Rahlf as trustee to bind the holders of the unsubordinated bonds in the junior foreclosure proceeding, were admitted to be true, and since for the purpose of the trial all the material facts alleged in the answer were also admitted to be true by reason of plaintiff's failure to reply to same, the contro-

case alleging that he is the owner of a receiver's certificate which had been issued to him in the junior foreclosure proceeding of the subordinated bonds; that the issuance of the certificate had been authorized by Ralli, the first mortgage trustee, by the letter hereto-fore referred to from Ralli to Upmeier, the receiver in said proceeding; that there is a balance of $1,500 due him on said certificate, to-gether with interest at 6% per annum from October 29, 1930; that the title of the defendant, Chicago City Bank & Trust Company, which was derived through the foreclosure sale held pursuant to the decree entered in the subsequent complete foreclosure of the unsubordinated bonds, is subject to the lien of the receiver's certificate; and that plaintiff is entitled to a reasonable allowance for his attorneys' fees. The complaint concluded with a prayer for an accounting, the appoint-ment of a receiver, a sale of the property in question in satisfaction of the amount found to be due plaintiff and a deficiency judgment.

The defendant, Chicago City Bank & Trust Company, as trustee, filed an answer denying that the receiver's certificate was a lien on either the rents accruing from or on the fee title to the property involved, and alleged in detail the facts hereinbefore set forth concerning the subsequent complete foreclosure of the unsubordinated bonds after the receiver's certificate had been issued in the partial foreclosure proceeding, the entry of the decree in the complete fore-closure proceeding, the sale held pursuant thereto and the issuance of the master's deed upon the expiration of the period of redemption. The answer also denied that Ralli as trustee had authority in the junior foreclosure proceeding to bind the holders of the unsubordinated and secured bonds and prayed for the entry of a decree dismissing plain-tiff's complaint for want of equity.

Since substantially all the material facts alleged in the complaint, except the authority of Ralli as trustee to bind the holders of the unsubordinated bonds in the junior foreclosure proceeding, were admitted to be true, and since for the purpose of the trial all material facts alleged in the answer were also admitted to be true, the reason of plaintiff's failure to reply to same, the contro-

versy resolved itself purely into a question of law.

No evidence was offered by plaintiff other than his introduction of documentary evidence, which consisted of the letter of Kahlf to Optner, the remodelling contract, a certified copy of the order directing the issuance of the receiver's certificate, a certified copy of the order approving the form of the receiver's certificate, a certified copy of the order extending the receivership from the partial foreclosure proceeding to the complete foreclosure proceeding, the receiver's certificate itself, showing an unpaid balance of principal due thereon of $1,800, and a certified copy of a plan of reorganization. The letter of Kahlf to Optner was received in evidence over the specific objection of defendant that plaintiff had not attempted to prove Kahlf's authority in the junior foreclosure proceeding to bind the holders of the unsubordiated and unmatured bonds. No evidence was offered by the defendant.

The decree found that plaintiff's receiver's certificate is a first and prior lien upon the title and upon the rents and income to be derived from the real estate described in said certificate paramount to the rights of all parties to this cause and further found that the title of the defendant, Chicago City Bank & Trust Company, as trustee, to the property in question and its right to rents and income from same is subject and subordinate to the lien of the plaintiff as the holder of the receiver's certificate and directed that unless the sum of $2,935 with interest thereon was paid to plaintiff by defendant within thirty days, plaintiff's lien should be enforced, either by the appointment of a receiver to collect the rents and income until a sufficient amount was realized to pay the amount found to be due plaintiff, or by the sale of the real estate in satisfaction thereof or by both the appointment of a receiver and a sale of the property.

Defendant's first contention is that a court of chancery has no authority to direct the sale of real estate, the title to which has been acquired from the grantee of a master's deed issued in a proceeding for the complete foreclosure of a first mortgage, to satisfy a

very received itself purely into a question of law.

No evidence was offered by plaintiff other than his introduction of documentary evidence, which consisted of the letter of Hahlf to Optner, the remodelling contract, a certified copy of the order directing the issuance of the receiver's certificate, a certified copy of the order approving the form of the receiver's certificate, a certified copy of the order authorizing the receivership from the partial foreclosure proceeding to the complete foreclosure proceeding, the receiver's certificate itself, showing an unpaid balance of principal due thereon of $1,800, and a certified copy of a plan of reorganization. The letter of Hahlf to Optner was received in evidence over the specific objection of defendant that plaintiff had not attempted to prove Hahlf's authority in the junior foreclosure proceeding to bind the holders of the unauthorized and unmatured bonds. No evidence was offered by the defendant.

The decree found that plaintiff's receiver's certificate is a first and prior lien upon the title and upon the rents and income to be derived from the real estate described in said certificate paramount to the rights of all parties to this cause and further found that the title of the defendant, Chicago City Bank & Trust Company, as trustee, to the property in question and its right to rents and income from same is subject and subordinate to the lien of the plaintiff as the holder of the receiver's certificate and directed that unless the sum of $2,935 with interest thereon was paid to plaintiff by defendant within thirty days, plaintiff's lien should be enforced, either by the appointment of a receiver to collect the rents and income until a sufficient amount was realized to pay the amount found to be due plaintiff, or by the sale of the real estate in satisfaction thereof or by both the appointment of a receiver and a sale of the property.

Defendant's first contention is that a court of chancery has no authority to direct the sale of real estate, the title to which has been acquired from the grantee of a master's deed issued in a proceeding for the complete foreclosure of a first mortgage, to satisfy a

balance due the holder of a receiver's certificate issued in a prior proceeding to foreclose a junior incumbrance.

As a general rule the rights of holders of vested superior liens cannot be subordinated without the consent of the holders of such liens for the purpose of enabling a receiver to acquire funds with which to manage and operate private property for the benefit of junior interests. In the recent case of Cody Trust Company v. Hotel Clayton Company, 293 Ill. App. 1, a receiver had been appointed in a partial foreclosure proceeding brought by the Cody Trust Company, individually and as trustee, for its exclusive benefit as the holder of certain subordinated interest coupons secured by a trust deed on real estate improved with a hotel. Subsequently the Chicago Title & Trust Company, as successor trustee to the Cody Trust Company, filed its complaint on behalf of the holders of all unsubordinated bonds and interest coupons for the complete foreclosure of the same trust deed and procured the entry of an order extending the receivership to the latter case. Prior to the extension of the receivership the receiver had incurred obligations in his management of the hotel for supplies, wages and merchandise. The creditors filed petitions in both proceedings, praying for the issuance of receiver certificates, which would constitute superior liens on the real estate prior to that of all other persons, including the lien of all of the first mortgage bondholders. Upon the application of the creditors and over the objection of the successor trustee, the court entered an order in both cases directing the issuance of certificates to the creditors payable six months after date and further directing "that the certificates should constitute a lien on the premises and the rents thereof and any funds realized from the sale thereof prior to the lien of all persons claiming any lien on the premises." In that case the court said at pp. 15, 16, 17 and 18:

"It is proposed by the petitioners that by the process of collecting the income, rents and profits of the premises by the receiver to pay the subordinated demands of the Cody Trust Company,

balance due the holder of a receiver's certificate issued in a prior proceeding to foreclose a junior incumbrance.

As a general rule the rights of holders of vested superior liens cannot be subordinated without the consent of the holders of such liens for the purpose of enabling a receiver to acquire funds with which to manage and operate private property for the benefit of junior interests. In the recent case of Cody Trust Company v. Hotel Clayton Company, 293 Ill. App. 1, a receiver had been appointed in a partial foreclosure proceeding brought by the Cody Trust Company, individually and as trustee, for its exclusive benefit as the holder of certain subordinated interest coupons secured by a trust deed on real estate improved with a hotel. Subsequently the Chicago Title & Trust Company, as successor trustee to the Cody Trust Company, filed its complaint on behalf of the holders of all unsubordinated bonds and interest coupons for the complete foreclosure of the same trust deed and procured the entry of an order extending the receivership to the latter case. Prior to the extension of the receivership the receiver had incurred obligations in his management of the hotel for supplies, wages and merchandise. The creditors filed petitions in both proceedings, praying for the issuance of receiver certificates, which would constitute superior liens on the real estate prior to that of all other persons, including the lien of all of the first mortgage bondholders. Upon the application of the creditors and over the objection of the successor trustee, the court entered an order in both cases directing the issuance of certificates to the creditors payable six months after date and further directing "that the certificates should constitute a lien on the premises and the rents thereof and any funds realized from the sale thereof prior to the lien of all persons claiming any lien on the premises." In that case the court said at pp. 17, 18, 19 and 20:

"It is proposed by the petitioners that by the process of collecting the issues, rents and profits of the premises by the receiver be put the subordinated demands of the Cody Trust Company,

the claims of the petitioners for services, material, and money furnished for the operation of the hotel, are superior to the original lien of the trust deed in favor of the bondholders and their claims should be made a lien on the premises, by means of receiver's certificates, paramount to the lien of the bondholders.

"As a general rule, the fixed legal right of a mortgagee cannot be impaired by any equities subsequently arising against the objection of the mortgagee. In the case of Kneeland v. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379, it was said: 'It is the exception and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be a growing idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens.' The general rule is not controlling in cases of railroad mortgages. A mortgagee of a railroad accepts the lien of his mortgage with the understanding and condition that the necessary expenses of the operation of the railroad by a receiver may by a court of equity, within prescribed limits, be given a preference as unsecured claims over the lien of his mortgage. It has been stated that this is the most extreme exercise of power ever ventured upon by a court of equity. High on Receivers, 4th ed., sec. 398. ***

"In the case at bar, the effect and result of the orders making the receiver's certificates a first lien on the mortgaged premises is to compel the first lien holders to pay for the attempted collection or satisfaction of the subordinated or second lien of the Cody Trust Company. In any case, assuming that it is a valid exercise of jurisdiction by a court of equity, the question of making receiver's certificates a first lien superior to prior vested liens, is purely an equitable one, and to be determined upon just and equitable principles, as the circumstances of the case shall warrant. As pointed out in the case of Fleming v. Anderson, supra [220 Ill. App. 570], it may be done in receiverships of industrial corporations when it is made very clear to the court that it is for the best interests of all parties that the power be exercised in order to preserve the corporate property or the franchise of the corporation. In the case of Makeel v. Hotchkiss, 190 Ill. 311, it is held that a receiver's expenses for running a hotel would not be made a paramount lien upon the mortgaged hotel, superior to the rights of the holder of a master's deed under a foreclosure sale, who was not a party to the receivership suit, which involved only the equity of redemption. (Thomsen v. Cullen, 196 Wis. 581, 219 N. W. 439.) The bondholders were entitled to their day in court and to contest the validity of the order giving the receiver's certificates priority over the trust deed. (Mercantile Trust Co. v. Tennessee Cent. R. Co., 291 Fed. 462; Sibley County Bank of Henderson v. Crescent Milling Co., 161 Minn. 360, 201 N. W. 618.)"

The reluctance of courts to impair the security of vested liens is well illustrated in Hooper v. Central Trust Co., 81 Md. 559, where the court said at pp. 591 and 593:

"When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safe keeping and preservation are properly payable out of the income, if there be any, or if there be none, then out of the proceeds of the corpus of the estate when sold. But this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. 'Extensive as are the powers of Courts of Equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private

the claims of the petitioners for services, material, and money furnished for the operation of the hotel, are superior to the original lien of the trust deed in favor of the bondholders and their claims should be made a lien on the premises, by means of receiver's certificates, paramount to the lien of the bondholders.

"As a general rule, the fixed legal right of a mortgagee cannot be impaired by any equitable subsequently arising against the objections of the mortgagee. In the case of Donelson v. Jackson & First Co., 1:6 U. S. 89, 2 L. Ed. 77, it was held 'If is the exception and not the rule, that such priority of liens can be displaced. In explaining this fact of the marshaling of contract liens, for the reason that there seems to be a growing idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens.' The general rule is not controlling in cases of railroad mortgages. A mortgagee of a railroad acquires the lien of his mortgage with the understanding and condition that the necessary expenses of the operation of the railroad by a receiver may by a court of equity, within prescribed limits, be given a preference as measured claims over the lien of his mortgage. It has been stated that this is the most extreme exercise of power ever ventured upon by a court of equity. High on Receivers, 4th ed., sec. 398. ***

"In the case at bar, the effect and result of the orders making the receiver's certificates a first lien on the mortgaged premises is to compel the first lien mortgagee to pay for the attempted rehabilitation or satisfaction of the subordinated or second lien of the Cody Trust Company. In our opinion, assuming that it is a valid exercise of jurisdiction by a court of equity, the question of making receiver's certificates a first lien superior to prior vested liens, is purely an equitable one, and to be determined upon just and equitable principles, as the circumstances of the case shall warrant. As pointed out in the case of Fleming v. Anderson, supra [230 Ill. App. 370], it may be done in receivership of industrial corporations when it is made very clear to the court that it is for the best interests of all parties that the power be exercised in order to preserve the corporate property or the franchise of the corporation. In the case of Jones v. Hotchkiss, 190 Ill. 111, it is held that a receiver's expenses for running a hotel would not be made a paramount lien upon the mortgaged hotel, superior to the rights of the holder of a mortgagee's deed under a foreclosure sale, who was not a party to the receivership suit, which involves only the equity of redemption. (Thomson v. Cullen, 196 Ala. 281, 219 N. E. 439.) The bondholders were entitled to their day in court and to contest the validity of the order giving the receiver's certificates priority over the trust deed. (Pennsylvania Trust Co. v. Tennessee Coal, R. Co., 291 Fed. 407; Ulster County Bank of Kingston v. Kingston Utilities Co., 101 Misc. 300, 201 N. Y. 614.)"

The reluctance of courts to impair the security of vested liens is well illustrated in Dauer v. Central Trust Co., 31 Md. 379, where the court said at pp. 391 and 393:

"When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safe keeping and preservation are properly payable out of the income, if there be any, or it there be none, then out of the proceeds of the corpus of the estate when sold. But this necessary power by no means includes authority on such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. 'Receivers do not have the power of equity, they do not authorize a mortgagee to take superior the force of mere multiplications and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private

corporations and natural persons, it is the duty of Courts to uphold and enforce them against all subsequent encumbrances.' Farmers' Loan and Trust Co. v. Grape Creek Coal Co., 50 Fed. Rep. 481; S. C. 16 L. R. A. 603. *** It would be exceedingly dangerous to concede to a Court of Equity the power to displace, in favor of receivers' certificates, subsisting liens on the property of private corporations, or of individuals. No mortgage lien would ever be secure if it were liable to be postponed to subsequent obligations created by a receiver."

In Hanna v. State Trust Co., 70 Fed. 2, the court in discussing this question said at pp. 5, 7 and 8:

"The precise question in this case is whether a court of chancery which has appointed a receiver for an insolvent private corporation in a foreclosure suit brought by a second mortgagee may, against the objection of the first mortgagee, authorize its receiver to issue receiver's certificates to raise money to carry on the business of the insolvent corporation and to improve its lands, and make such certificates a first and paramount lien upon the lands covered by the first mortgage. So far as we are advised, the power to do this has been denied in every case in which the question has arisen. ***

"In this case, the company being insolvent, and its property mortgaged for more than it was worth, there was no way of raising money to set the receiver up in business, except by the court giving its obligations, in the form of receiver's certificates, and making them a paramount lien on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation, and the junior mortgagee united in urging the court to arm its receiver with the desired powers. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security; so that it had nothing to lose, and everything to gain, in experiments to enhance the value of the mortgaged property, so long as the cost of those experiments are made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. ***

"If junior lien creditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a sawmill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court and those courts would soon be conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporation at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value."

It will be recalled that Rahlf, the original trustee under the trust deed, who was one of the complainants in the suit for the partial foreclosure of the trust deed, authorized the issuance of plaintiff's certificate for the cost of the aforesaid remodeling during the prosecution of the junior subordinated proceeding. Inasmuch as Rahlf, the cocomplainant, with Wollenberger & Company, of which he was an

corporations and natural persons. It is the duty of courts to consider and enforce these equitable considerations.' Lamont v. Lamont Loan and Trust Co. v. Queen Creek Land Co., 70 Pac. Rep. 481; S. v. Ex. [illegible] 107. [illegible] It would be exceedingly dangerous to consider it a court of equity the power to dispense, in favor of insolvent' creditors, substituting liens on the property of private corporations, or of individuals. Do mortgage liens which over be secure if it were liable to be postponed to subsequent obligations created by a receiver.*

In Hamm v. State Trust Co., 70 Pac. 4, the court in discussing this question said at pp. 5, 7 and 8:

"The precise question in this case is whether a court of chancery which has appointed a receiver for an insolvent private corporation is a foreclosure suit brought by a second mortgagee may, against the objection of the first mortgagee, authorize the receiver to issue receiver's certificates to raise money to carry on the business of the insolvent corporation and to improve its lands, and make such certificates a first and paramount lien upon the lands covered by the first mortgage. So far as we are advised, the power to do this has been denied in every case in which the question has arisen. ***

"In this case, the company being insolvent, and its property mortgaged for more than it was worth, there was no way of raising money to pay the receiver up in business, except by the court giving the obligations, in the form of receiver's certificates, and making them a paramount lien on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation, and the junior mortgagee united in urging the court to use its receiver with the limited power. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security, so that it can continue to live, and everything to gain, in endeavoring to enhance the value of the mortgaged property, so long as the work of these corporations are made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. ***

"If junior liens creditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a small, primitive, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court and these powers would be exercised conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporation at the risk and expense of these nothing the first or prior liens on the property of the corporation, such liens would have little or no value.*

It will be recalled that Hahl, the original trustee under the trust deed, who was one of the complainants in the suit for the partial foreclosure of the trust deed, authorized the issuance of plaintiff's certificate for the cost of the aforesaid remodeling during the prosecution of the junior subordinated proceeding. Thereafter in fact, the complainant, with Wollenberger & Company, of which he was an

officer, was acting in that proceeding solely for the benefit of Wollenberger & Company as the holder of the subordinated bonds and interest coupons, he could not be held to have had authority therein to bind the holders of the unsubordinated bonds and interest coupons on the theory that they were quasi parties by representation. (Cody Trust Company v. Hotel Clayton Company, supra; Belknap Savings Bank v. Lamar Land & Canal Co. et al., 40 Ore. 523, 64 Pac. 212; Raht, Executor et al. v. Attrill et al., 106 N. Y. 423, 13 N. E. 282.)

The trial court in the instant case not only disregarded the limitation of the order entered in the partial foreclosure proceeding authorizing the issuance of the receiver's certificate, but also disregarded the provisions of the certificate itself when it decreed the certificate to be a first lien on the property in question. The order entered on October 7, 1930, in the junior proceeding, directing the issuance of receiver's certificates, provided that the proposed certificates "shall and are hereby made a first and prior lien upon the rents, issues, income and profits hereafter received by the receiver from the premises and chattels described in the complainant's bill of complaint filed in the above entitled cause." That order also provided "that the said Receiver pay the Certificates of Evidence of Indebtedness issued pursuant hereto from and out of the rents, issues, income and profits to be derived from the aforesaid premises and chattels when the same shall be and may be received by said receiver for and during a period of two years from the date hereof." The language of the order, being clear, plain and understandable, was not open to construction. The order definitely determined that the certificate should be a lien on the rents only and that it was payable by the receiver from rents received by him during a period of two years commencing with the date of the entry of said order.

In view of the fact that the certificate itself recites that it was issued under and by virtue of the authority granted to the receiver by the order of October 7, 1930, and states that it "is by virtue of the terms of said order a first and prior lien upon the

officer, was acting in that proceeding solely for the benefit of Wollenberger & Company as the holder of the subordinated bonds and interest coupons, he could not be held to have had authority thereby to bind the holders of the unsubordinated bonds and interest coupons on the theory that they were unpaid parties by representation. (Goby First Company v. Hotel Clayton Company, supra; Baltimore Savings Bank v. Lamar Land & Canal Co. et al., 40 Ore. 523, 64 Pac. 212; Bank. Commerce et al. v. Atwell et al., 106 S. W. 1. 441, 12 S. W. 2d.)

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In view of the fact that the certificate itself recites that it was issued under and by virtue of the authority granted to the receiver by the order of October 7, 1930, and states that it "is by virtue of the terms of said order a first and prior lien upon the

rents, issues, income and profits received by the receiver from the premises and chattels on the above described premises," it is difficult to understand the theory upon which the trial court in its decree not only revived the expired lien of plaintiff's certificate upon the rents accruing from the property, but enlarged its scope by declaring said certificate to be a paramount lien upon the property itself to the detriment and displacement of defendant's interest as the holder of the fee title acquired through the subsequent complete foreclosure, which had been prosecuted for the sole benefit of the prior vested lienholders. As already shown plaintiff's certificate was not nor did it purport to be a lien on the title to the property in question but was only a lien on the rents to be collected during the receivership in the junior foreclosure proceeding.

If plaintiff's certificate possesses the superior qualities which it is now claimed to have, he should have asserted his right to participate in the proceeds of the sale, amounting to $20,000, under the subordinate foreclosure decree. This sale was had in August, 1931. Since the order under which the certificate was issued explicitly made it a lien only upon the rents and provided for its payment by the receiver out of rents collected by him during the period of two years, it seems strange that, after the extension of the receivership, plaintiff utterly disregarded the receivership proceeding out of which he might have expected to be paid. The receivership was never insolvent, yet plaintiff did not see fit to assert his claim for the balance due on his certificate against the receiver at any time.

Plaintiff received payments on his certificate until the order extending the receivership was entered November 27, 1931, but he did nothing thereafter to enforce the lien of said certificate or to collect the balance now claimed to be due thereon until he instituted this proceeding on March 24, 1939. We are also at a loss to understand why plaintiff did not attempt to participate in the proceeds of the sale held in the complete foreclosure proceeding if his certificate had the enduring priority now claimed for it instead of now attempting

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to attack the title received by the defendant, Chicago City Bank & Trust Company, from the grantee in the master's deed issued as a result of the sale held in the complete senior foreclosure proceeding. In our opinion plaintiff's claim is entirely lacking in merit.

Other points urged have been considered but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the decree of the Circuit court is reversed and the cause is remanded with directions to dismiss plaintiff's complaint for want of equity.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

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For the reasons stated herein the decree of the Circuit Court is reversed and the cause is remanded with directions to dismiss plaintiff's complaint for want of equity.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Pigott and Goldman, JJ., concur.

40712

ARLOUINE PRICE,
Appellee,

v.

YELLOW CAB COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

123A

305 I.A. 622

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Arlouine Price, plaintiff, while riding as a passenger for hire in one of defendant's taxicabs with two other women, was injured when the cab ran into the concrete foundation of an electric light post at the entrance to St. Luke's Hospital, in Chicago. She brought suit of trespass on the case. Trial by jury resulted in a verdict of $40,000 in her favor, of which $10,000 was remitted and judgment was entered for $30,000. Defendant appealed.

Miss Price was a trained nurse, who had at various times served at St. Luke's Hospital. At the time of the accident, which occurred August 27, 1936, she was 36 years of age. Plaintiff with two other women entered the taxicab at the entrance of St. Luke's Hospital on Michigan avenue. The cab proceeded westward through the gates of the hospital, and when it reached within ten feet of the concrete post in the center of Michigan boulevard, a little to the south of the hospital entrance, it either stopped or slowed down. The driver was apparently looking north watching southbound traffic, and as he turned south the cab collided with the concrete post in the center of the boulevard. The three passengers were thrown from their seats. Two of them sustained only minor bruises, but plaintiff claims to have been thrown in such a manner that when the cab stopped she was found seated on the floor with her knees pressed against her chest. Apparently there was no damage to the cab,

40713

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305 I.A. 622

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which backed up immediately into the driveway of the hospital. Plaintiff was taken into the examining room in a wheel chair, and after an examination was put to bed. The examination on admission shows contusions and abrasions to both knees, possible fracture of left patella, a bruise on the left forehead, a cut on the right upper lip, bruises on both elbows, the left knee and the left hip. She was placed in charge of Dr. Hansen, a member of the staff, who looked after patients of the Yellow Cab Co. at the hospital.

Plaintiff complained of many pains and aches and specialists on the staff were called in for examinations in an effort to diagnose and determine the extent of her injuries. Among these specialists were Dr. Edwin W. Ryerson, an orthopedic physician, Dr. Frank Brawley, a specialist on the eye, Dr. George W. Hall, a neurologist, and others. Numerous X-ray pictures were taken by Dr. E. L. Jenkinson, the roentgenologist of St. Luke's Hospital, and remedial measures were adopted to take care of the superficial bruises. Among plaintiff's early complaints was an injury to her neck. X-ray pictures were taken and she was treated for this injury. After some five or six weeks she left the hospital on October 8, 1936, and numerous witnesses testified that she walked out at the end of her treatment without any indication of a limp. It was conceded on oral argument that her minor injuries, cuts and bruises, had disappeared at the time she left the hospital in October, 1936. It subsequently developed, however, that an injury to the left sacroiliac joint was the one upon which greatest emphasis was laid upon the trial, and voluminous testimony was received with reference to the nature and extent thereof.

After plaintiff left the hospital the first time she returned to the place where she resided in Chicago, and while there applied home remedies, such as a heating pad on her head and neck, hot showers, and sodium for an upset stomach. After she had been home for about two weeks she called Dr. W. J. Jeffries, who had never treated her

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before. She went out for meals, and testified that she suffered from dizziness and pain and had some difficulty in controlling her legs, which "kept jerking". On one of Dr. Jeffries' visits, Dr. Hansen also happened to call on her. He had no knowledge that Dr. Jeffries had been consulted. The two physicians suggested that she return to the hospital. The clinical history of the hospital, prepared by an interne, indicates that the patient returned with the same complaints she had on her previous visit, namely, nausea, occasional vomiting, headache, dizzy spells and diarrhea. On the second visit she also complained of pain in the back and severe itching in her left foot and leg. Various types of treatment were applied, including ice bag, infra-red lamp, alcohol rubs, and medicine for extreme restlessness. She left the hospital on December 22, fairly comfortable and considerably improved.

Plaintiff entered the hospital for the third time in May, 1937, and remained some three or four weeks. She entered the hospital with a limp on her left side, and complained of pains in her back. Laboratory tests were made and traction was applied on her hip. The hospital records indicate that although she was quite uncomfortable because of the traction weights, she rested more easily as time elapsed, slept better, but still complained of pain in her back.

Because of some thickening in the sacroiliac joint, as shown by X-rays, it was important to ascertain whether or not plaintiff had ever had any infective diseases which might produce a thickening of the joint. By agreement of counsel the records of another stay in St. Luke's Hospital, in February, 1931, were introduced in evidence. They show that she then suffered from incipient pulmonary tuberculosis and hypothyroidism. The records further show that she had a fever for two years, running to approximately 100° every afternoon, a white blood count of 15,000 for a year, as against a normal of 9,000, that she had had blood and gray matter in the sputum, repeated attacks of "flu", complicated with pleurisy, diarrhea from four to five years, night sweats for a period of six months, repeated nasal hemorrhage,

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Because of some thickening in the acetabulae joint, as shown by X-rays, it was important to ascertain whether or not plaintiff had ever had any infective disease which might produce a thickening of the joint. By agreement of counsel the records of another stay in St. Luke's Hospital, in February, 1931, were introduced in evidence. They show that she then suffered from incipient pulmonary tuberculosis and hyperthyroidism. The records further show that she had a fever for two years, running to approximately 100° every afternoon, a white blood count of 17,000 for a year, as against a normal of 9,000, that she had had blood and gray matter in the sputum, repeated attacks of "flu", complicated with pleurisy, diarrhea from four to five years, night sweats for a period of six months, repeated nasal hemorrhages

cough, general body aches, gastro-intestinal upsets, soreness across the chest, and shortness of breath. Examination of her stool showed some streptococcus, and a basal metabolism examination at that time showed hypothyroidism to an alarming extent. Defendant argues that these multiple ailments in 1931 indicate infection which might have accounted for the thickening in the sacroiliac joints. Plaintiff, on the other hand, insists that she had recovered from these ailments, and during the years immediately preceding the injury was completely recovered so that she was able to play tennis, ride horseback and indulge in other forms of exercise.

Some of the specialists who were called in to attend plaintiff to administer to her complaints were unable to diagnose them as serious ailments. She complained of double vision, but Dr. Brawley, an eye specialist, who was senior attending eye surgeon at St. Luke's Hospital, found no injury to the eye, no double vision and nothing except ordinary refractive errors which age brings on and glasses correct. Dr. George W. Hall, senior neurologist and physchiatrist at St. Luke's Hospital, made an examination, but kept no notes and had no recollection of his attendance on plaintiff. Dr. Edwin W. Ryerson had her in his care in October, 1936, and examined her carefully. She made complaints of her abdomen, but he could find no basis therefor. He did find that there was no rigidity of the muscles of the spine, as commonly found after injury or disease in the spinal column. Her knee and hip joints were free and movable, and he concluded that there was no definite injury to either the knee or the hip. Upon his examination of the X-rays he was unable to find any signs of injury to the sacroiliac joint. There was no muscle spasticity in the back. She returned to him for examination the following year, and his conclusions were the same.

In December, 1937, plaintiff saw Dr. Chaloupka, who referred her to Dr. Daniel H. Leventhal. Dr. Chaloupka was not called as a witness, but Dr. Leventhal, who examined her thoroughly, testified upon the hearing. Dr. Leventhal is an orthopedic surgeon and assistant professor in that branch of medicine at the University of Illinois

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and attending orthopedic surgeon at Michael Reese and Cook county hospitals. His examination was thorough and was reduced to writing. The conclusion reached by him was that plaintiff was suffering from hysteria or was malingering. A subsequent examination of plaintiff was made by Dr. Paul B. Magnuson, a specialist in bone surgery, who was on the faculty of Northwestern University and attending surgeon at Passavant Hospital. He was called as a witness on behalf of plaintiff and was the only one of the several specialists who found an injury to the sacroiliac joint and attributed the arthritis of which plaintiff complained to the injury. Dr. Magnuson said that where infectious disease caused joint inflammation, that usually is general in character, and not localized, and that, "if she had any infection in her system back in 1931, that was going to affect her joints, it would have affected them before 1936." He also said that the condition could be cured by a fusion or bone-welding operation, which, if successful, would free the plaintiff from pain and eliminate the limp which she acquired in walking. At the conclusion of his testimony, the court requested the jury to withdraw from the court room, and out of its presence made the following statement: "The Court: The jury being out, do either of you want this woman to walk across the room?" Defendant's counsel replied that he would like to have Dr. Magnuson see her walk, and she accordingly walked up and down in the court room. The jury was then recalled, and Mr. Ryan, counsel for plaintiff, then said: "I would like to ask the doctor a question. In the light of what has occurred." Dr. Magnuson resumed the stand in the presence of the jury and plaintiff's counsel continued: "Dr. Magnuson, at the request of court or counsel, the plaintiff walked from where she is sitting over to the bench and back twice, in your presence and under your observation. Is that correct? A. That is right. Q. Have you any comments to make on it, Doctor, that would enlighten the jury, as to whether that walk is assumed or not, or natural under the circumstances? A. It looks to me, Mr. Ryan, in this form, as though it was exaggerated and assumed."

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Of course, all this evidence, which is quite voluminous and occupies some 1,[illegible] pages of the record, was submitted to the jury. It passed upon the conclusions of Dr. Leventhal with reference to hysteria or malingering, upon the testimony of Dr. Bradley, Dr. Myerson, Dr. Hanson and others.

The sole points presented as ground for reversal are that the manifest weight of the evidence is against damages in the amount of $30,000, that the verdict is excessive, that it was produced by passion and prejudice, caused by demonstrations of sobbing and hysteria made before the jurors and calculated to inflame their minds and aggravate the damage. We have carefully examined the record, which is replete with daily case histories of the patient while she was in the hospital on three occasions, including complaints registered by her, methods of treatments applied, as well as the detailed evidence of the various medical witnesses who testified on the hearing. While it appears to us that plaintiff unquestionably sustained severe injuries in the accident, we have reached the conclusion that the manifest weight of the evidence is against damages in the amount for which judgment was entered. While we realize that it is difficult to fix the specific amount of damages sustained by plaintiff, we believe that a further remittitur of $15,000 would fairly represent compensation for injuries sustained by her. Therefore, if plaintiff will file in this court within thirty days her consent to a further remittitur of $15,000, judgment will be entered here in her favor for $15,000; otherwise, the judgment will be reversed and cause remanded to the Circuit court with directions to retry the cause on the sole issue of the question of damages.

JUDGMENT REVERSED AND JUDGMENT HERE FOR $15,000 IN FAVOR OF PLAINTIFF UPON REMITTITUR OF $15,000 BEING FILED IN THIS COURT IN THIRTY DAYS BY PLAINTIFF; OTHERWISE, JUDGMENT REVERSED AND CAUSE REMANDED TO THE CIRCUIT COURT WITH DIRECTIONS TO RETRY CAUSE ON SOLE ISSUE OF THE QUESTION OF DAMAGES.

Sullivan, P. J., and Scanlan, J., concur.

[illegible]

[illegible] all this evidence, which is quite conclusive, and [illegible] page of the record, was submitted to the jury. It proved upon the pronouncement of Dr. Jorrendal with reference to [illegible] or malingering, upon the testimony of Dr. Brooks, Dr. [illegible], Dr. Thomas and others.

The only point presented as ground for reversal are that the medical weight of the evidence is against damage in the amount of $[illegible], that the verdict is excessive, that it was produced by passion and prejudice, caused by demonstrations of sobbing and hysteria made before the jurors and calculated to influence their minds and sympathies in the damage. We have carefully examined the record, which is replete with duly sworn testimony of the parties with, and in the hospital on these occasions, including complaints registered by jury, attitude of hysterical epileptic, as well as the distinct testimony of the various medical witnesses who testified on the trial. While it appears to be that plaintiff unquestionably manifested severe hysteria in the courtroom, we have treated the contention that the medical weight of the evidence is against damage in the amount for which judgment was entered. While we realize that it is difficult to fix the specific amount of damage sustained by plaintiff, we believe that a further consideration of liquor which **fairly** [illegible] the injuries sustained by her. Therefore, if plaintiff will file in the court within thirty days her election to a further reduction of $[illegible], judgment will be entered nunc pro tunc for the $[illegible] stipulated. Judgment will be reversed and final remanded on the ground that [illegible] is entitled to verify the amount on the main issue of the question of damages.

[illegible]

[illegible] and [illegible] concur.

40736

FANNIE G. ANDERSON,
Appellee,

v.

THE TRUST COMPANY OF CHICAGO,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

124A

305 I.A. 623

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

September 23, 1925, plaintiff entered into written articles of agreement with H. O. Stone & Co. for the purchase of a subdivided lot in Cook county for which she undertook to pay the sum of $1,200 in installments of $13 each month. Payments of principal made to H. O. Stone & Co., up to August 30, 1929, in addition to monthly interest payments on the balance remaining due from time to time, as well as the payment of all assessments and real estate taxes in accordance with the terms of her agreement, reduced the purchase price to a balance of $453.

May 5, 1929, Stone & Co. assigned the contract to Chicago Trust Company as trustee under a so-called declaration of trust, together with other contracts for the purchase of subdivided lots, for the benefit of certain bondholders and for the uses therein specified. Under this declaration of trust it was provided, among other things, that the trustee would hold for the benefit of all beneficiaries, of whom plaintiff was one, certain real estate which the trustee agreed to manage and operate as a going liquidating real estate business, and in which the trustee was designated to be the legal and beneficial owner in fee simple. The trust agreement provided that any contract purchaser might obtain a deed from the trustee upon complying with all the terms of his contract, and that all collections under the contracts should be made by the trustee.

Subsequently, the Central Republic Bank & Trust Co. succeeded,

40736

FANNIE G. ANDERSON,
Appellee,

v.

THE TRUST COMPANY OF CHICAGO,
a corporation,
Appellant.

ANNUAL FROM SUPERIOR COURT,

COOK COUNTY.

3051 I.A. 623

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

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Subsequently, the Central Republic Bank & Trust Co. succeeded,

by consolidation, to all the rights, obligations and duties of the Chicago Trust Company, and a legal decree entered in the consolidation proceeding provided that "any company into which the trustee may be merged shall be the successor trustee under this indenture, without the execution of any paper." In order to determine the extent of its powers relative to the contracts included in the trust, the Central Republic Bank secured an order or decree of court vesting it with power to demand and receive payments on contracts, modify the terms thereof and to employ agents to perform these various duties, and the decree at the same time approved an agreement between the Central Republic Bank as trustee and Chicago Title & Trust Co. whereby the latter was engaged as the agent of the former to perform these duties.

December 29, 1933, the present defendant, Trust Company of Chicago, acquired title to the lot in question by quitclaim deed from the Central Republic Bank, and on the same day, by an instrument in writing, accepted appointment as successor trustee and acquired the rights, powers and duties which had inured to its predecessor. January 1, 1934, defendant entered into a contract with Chicago Realty Finance Company, engaging it as agent with power to demand and receive all payments of principal and interest due under the pledged contracts, including plaintiff's, to serve notices of forfeiture, institute suits in the name of the Trust Company of Chicago, to enforce and collect payments under the contracts, and to reinstate, alter or modify them; and defendant secured the court's confirmation as to its right under the trust to enter into that agreement with Chicago Realty Finance Company. After plaintiff had made the substantial payments heretofore enumerated to H. O. Stone & Co. she continued to make payments to Chicago Title & Trust Company, as agent for the Central Republic Bank, and to Chicago Realty Finance Co., as agent for the Trust Company of Chicago, as successor in trust. From January 1, 1934, to and including February 18, 1937, plaintiff made payments regularly to Chicago Realty Finance Company, reducing the contract balance to $299.16. After

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February 18, 1937, she made payments direct to defendant.

In the fall of 1935, while plaintiff was making payments to Chicago Realty Finance Company, Fred Adams, its vice-president, suggested that if she would pay up her contract in full, he would waive the interest and give her a deed. She was unable to do this, however, and Adams then told her that if she would continue to make her monthly payments, a deed would ultimately issue. Accordingly, from April 7, 1937, to January 26, 1938, plaintiff continued to make payments direct to the Trust Company of Chicago, defendant, and July 10, 1938, she tendered to defendant the unpaid balance due on her contract and demanded a deed. Defendant refused to make the conveyance, it having developed that it had previously conveyed the property to one Bruno Drake, and thereupon plaintiff filed suit August 24, 1938, to recover all the payments made by her to H. O. Stone & Co. and the various assignees. Trial by the court without a jury resulted in a finding and judgment for plaintiff in the sum of $3,049, from which defendant appeals.

As the principal ground for reversal it is urged that the assignment of a contract for the sale of land does not impose a personal liability upon the assignee in the absence of an express agreement to assume the obligation, especially where the assignment is for security. Numerous cases are cited by defendant in support of this proposition, but in none of them do we find a situation where the assignee has promised to carry out the contract or where, as here, the property has been conveyed so that the contract could not be carried out. When on May 5, 1929, Stone & Company assigned plaintiff's contract to Chicago Trust Company, as trustee, the written assignment which was contained in the so-called declaration of trust recited that H. O. Stone & Co. "does hereby convey, grant, bargain, sell, assign, transfer and deliver unto Chicago Trust Company, as trustee, all the following contracts," listing plaintiff's agreement, "to have and to hold said contracts unto said trustee and to its successors for the benefit of the bondholders and for the uses of the trusts hereinafter stated." One of the articles of

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the trust provided that the trustee should possess, manage and ope the lands and contracts as a going, liquidating real estate business "it being intended hereby that the trustee shall be deemed to be the legal and beneficial owner in fee simple; that any contract purchaser may obtain a deed from the trustee upon complying with all the terms of their contract; and that all collections on the contracts should be made by the trustee." This we think was an undertaking by the Chicago Trust Company, as the first successor to H. O. Stone & Co. to carry out the contract and to deal with plaintiff, among others, in accordance with the undertaking of the original vendor.

When Central Republic Bank next appeared in the chain as successor in title it assumed like responsibilities and duties toward the trust property and plaintiff, and in order to determine the extent of its powers relative to the various purchase contracts it secured a decree of court providing that it had the power to demand and receive payments on the contracts, modify the terms thereof, and to employ agents to perform these various duties; and pursuant to this decree it employed Chicago Title & Trust Co. as its agent, who received from plaintiff payments on account of her purchase agreement.

Subsequently, in December, 1933, the present defendant, Trust Company of Chicago, acquired title to the lot covered by plaintiff's contract, through a quitclaim deed from Central Republic Bank & Trust Company, and thereafter appointed Chicago Realty Finance Company as its agent under an agreement which authorized the latter to receive payments of principal and interest under the pledged contracts, to serve notice of forfeiture, reinstate, alter and modify the agreement; and substantial payments were made by plaintiff to the Chicago Realty Finance Company pursuant to this arrangement. The record also discloses that a court order authorized and approved the appointment of Chicago Realty Finance Co. by the present defendants.

Thus, these various assignees undertook to carry out plaintiff's original contract, and payments were made by her and accepted by them from time to time. Consequently, when she had reduced the principal

the trust provided that the trustee should possess, manage and operate the lands and contracts as a going, liquidating real estate business, "it being intended hereby that the trustee shall be deemed to be the legal and beneficial owner in fee simple; that any contract purchaser may obtain a deed from the trustee upon complying with all the terms of their contract; and that all collections on the contracts should be made by the trustee." This we think was an undertaking by the Chicago Trust Company, as the first successor to H. G. Stone & Co. to carry out the contract and to deal with plaintiff, among others, in accordance with the undertaking of the original vendor.

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Thus, these various assignees undertook to carry out plaintiff's original contract, and payments were made by her and accepted by them from time to time. Consequently, when she had reduced the principal

to $299.16, and tendered the balance to defendant, she was entitled to a deed and the only reason assigned for the refusal of defendant to deliver a deed, aside from the legal ground heretofore stated, was that the property had previously been conveyed to Drake. To hold under the circumstances of this case, that the various assignees, including the present defendant, had not expressly assumed the liability of carrying out the agreement of H. O. Stone & Co., would be a denial of justice, since defendant's predecessors in title are no longer in existence. Defendant argues that it is not liable for the payments made to H. O. Stone & Co., the Chicago Trust Co., and the Central Republic Bank & Trust Company, and that it can be made to respond only for the payments made by plaintiff directly to defendant and its agent, the Chicago Realty Finance Company. We think this argument overlooks the inference that may fairly be drawn from the evidence that it had assumed the contract and was bound to carry out its provisions when plaintiff had tendered the small balance remaining due. (McGill v. Baker, 266 Pac. 138, 147 Wash. 394; Brady v. Fowler, 45 Cal. App. 592, 188 Pac. 320; Davidson v. Baker Fuel Oil Burner Co., 16 La. App. 339, 134 Southern 108.)

The Illinois decisions, Lunt v. Lorscheider, 285 Ill. 589, and Forthman v. Deters, 206 Ill. 159, and others cited by defendant merely hold that an assignee does not become liable on an executory contract unless by his agreement he assumes such liability. None of these cases, however, rested on a state of facts where an assumption of the agreement could be fairly presumed. The chain of circumstances in the case at bar clearly indicate an assumption of the undertaking by each of the assignees, including defendant, and distinguish this case from the decisions cited and discussed by defendant. Moreover, the Central Republic Bank and the Trust Company of Chicago both had decrees entered, providing that they had the power to enforce all the provisions of plaintiff's contract, and having had a court determination of their power they proceeded to collect the money due on the contract from plaintiff.

to $2299.16, and tendered the balance to defendant, who was entitled to a deed and the only reason assigned for the refusal of defendant to deliver a deed, aside from the legal ground hereinbefore stated, was that the property had previously been conveyed to Drake. To hold under the circumstances of this case, that the various assignees, including the present defendant, had not expressly assumed the liability of carrying out the agreement of R. O. Stone & Co., would be a denial of justice, since defendant's predecessors in title are no longer in existence. Defendant argues that it is not liable for the payments made to R. O. Stone & Co., the Chicago Trust Co., and the Central Republic Bank & Trust Company, and that it can be made to respond only for the payments made by plaintiff directly to defendant and its agent, the Illinois Realty Finance Company. We think this argument overlooks the inference that may fairly be drawn from the evidence that it had assumed the contract and was bound to carry out its provisions when plaintiff had tendered the small balance remaining due. (Bodell v. Baker, 266 Ma. 139, 147 Mass. 394) Murphy v. Fowler, 47 Kal. App. 292, 189 Pac. 320; Davidson v. Super Fuel Oil Burner Co., 16 La. App. 339, 134 Southern 108.)

The Illinois decisions, Hunt v. Lorenzinger, 205 Ill. 369, and Jackson v. Dunne, 204 Ill. 179, and others cited by defendant merely hold that an assignee does not become liable on an executory contract unless by his agreement he assumes such liability. None of these cases, however, rested on a state of facts where an assumption of the agreement could be fairly presumed. The chain of circumstances in the case at bar clearly indicate an assumption of the undertaking by each of the assignees, including defendant, and distinguish this case from the decisions cited and discussed by counsel. However, the Central Republic Bank and the Inter Ocean of Chicago took and became entered, providing that they had the power to enforce all the provisions of plaintiff's contract, and having had a sort determination of their power they proceeded to collect the money due on the contract from plaintiff.

During the period of thirteen years from the signing of the agreement in 1925, until 1938, there had been no forfeiture of the agreement, but on the contrary representations had been made to plaintiff by the successive assignees or their agents that upon completion thereof a deed would issue, and these representations were made to plaintiff from time to time as she made payments to the various assignees. The amount of the judgment is not questioned, but it embraces payments of principal, interest, special assessments and general taxes over a period of many years. Various other points are raised, which have no bearing, however, on the conclusions reached.

Plaintiff's additional abstract supplies evidence from the record showing the assumption of plaintiff's contract by the various assignees. This documentary evidence was not shown in the original abstract, although it was extremely important to a proper determination of this cause. Therefore plaintiff should be reimbursed for the expense of preparing and filing her additional abstract and the cost thereof is accordingly taxed against defendant. For the reasons given we think the court properly entered judgment in favor of plaintiff. The judgment is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

During the period of thirteen years from the signing of the agreement in 1925, until 1938, there had been no forfeiture of the agreement, but on the contrary representations had been made to plaintiff by the mineralize authorities or their agents that upon completion thereof a land would issue, and these representations were made to plaintiff from time to time as she made payments to the various assignees. The amount of the judgment is not questioned, but it embraces payments of principal, interest, special assessments and general taxes over a period of many years. Various other points are raised, which have no bearing, however, on the conclusions reached.

Plaintiff's additional abstract supplies evidence from the record showing the assumption of plaintiff's contract by the various assignees. This documentary evidence was not shown in the original abstract, although it was extremely important to a proper determination of this cause. Therefore plaintiff should be reimbursed for the expense of preparing and filing her additional abstract and the cost thereof is accordingly taxed against defendant. For the reasons given we think the court properly entered judgment in favor of plaintiff. The judgment is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Doerner, J., concur.

40965

ALFRED JOHNSON,
Appellee,

v.

EDWARD BALMES,
Appellant.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

305 I.A. 623

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Alfred Johnson, brought suit against Edward Balmes, defendant, for damages to his automobile resulting from a collision with defendant's milk truck on plaintiff's premises. Balmes filed a counterclaim for damages to his vehicle, and for milk spilled and eggs broken as the result of the collision. The suit was originally tried before a justice of the peace, pursuant to a jury waiver by both parties, resulting in findings and judgment in favor of plaintiff for $112.60 and the dismissal of defendant's counterclaim. An appeal was taken to the county court. A trial de novo without a jury again resulted in judgment for plaintiff of $112.60 and costs, and the dismissal of defendant's counterclaim. This appeal by defendant followed.

The essential facts disclose that the collision occurred in the forenoon on October 20, 1937, in the Village of Glen View, where plaintiff then resided. From a plat introduced in evidence, it appears that Johnson's residence was situated to the south of a highway and was accessible through a private driveway, approximately 100 feet in length, leading in a southerly direction toward the residence. This driveway was about ten feet in width for the first thirty or forty feet, and then swung toward the west in a circular direction along plaintiff's residence, around an "island" situated in front of the residence, back in an easterly direction to a garage, and then straight along the opposite side of the island in a straight line

ALFRED JOHNSON,
Appellee,

v.

EDWARD BAINES,
Appellant.

APPEAL FROM COURT OF COOK COUNTY.

305 I.A. 623

MR. JUSTICE PRIMO DELIVERED THE OPINION OF THE COURT.

Plaintiff, Alfred Johnson, brought suit against Edward Baines, defendant, for damages to his automobile resulting from a collision with defendant's milk truck on plaintiff's premises. Baines filed a counterclaim for damages to his vehicle, and for milk spilled and eggs broken as the result of the collision. The suit was originally tried before a justice of the peace, pursuant to a jury waiver by both parties, resulting in finding and judgment in favor of plaintiff for $112.60 and the dismissal of defendant's counterclaim. An appeal was taken to the county court. A trial de novo without a jury again resulted in judgment for plaintiff of $112.60 and costs, and the dismissal of defendant's counterclaim. This appeal by defendant followed.

The essential facts disclose that the collision occurred in the forenoon on October 20, 1937, in the village of Glen View, where plaintiff then resided. From a plat introduced in evidence, it appears that Johnson's residence was situated to the south of a highway and was accessible through a private driveway, approximately 100 feet in length, leading in a southerly direction toward the residence. This driveway was about ten feet in width for the first thirty or forty feet, and then swung toward the west in a circular direction along plaintiff's residence, around an "island" situated in front of the residence, back in an easterly direction to a garage, and then straight along the opposite side of the island in a straight line

where it connected with the driveway leading in from the main highway.

Balmes, who was engaged in the business of selling milk, butter and eggs, had been making deliveries at plaintiff's home for about four years. On the morning in question, after having delivered milk to plaintiff's residence, he was driving his Dodge delivery truck around the curve in a northeasterly direction toward the main highway, at a rate of speed described as 5 to 6 miles an hour, and collided with plaintiff's Pontiac automobile, which was then being driven by plaintiff from the highway toward his residence at approximately 15 miles an hour. The collision occurred at a curve where the driveway widens to approximately 16 feet. The view of both parties was obstructed at the curve by some dense shrubbery which made it impossible for either driver to see the other until immediately preceding the impact. Plaintiff contends, and both courts evidently found as a matter of fact, that defendant was negligent in failing to follow the law of the road and keep to the right, and that this act of negligence was the proximate cause of the damage which plaintiff sustained; that defendant, although an invitee, was bound to exercise reasonable care while on plaintiff's driveway, and is liable in damages for his failure so to do; and that plaintiff exercised the ordinary and reasonable care which the law required.

The several grounds for reversal all relate to questions of fact involving the relative negligence of the parties and their exercise of ordinary care in driving around the curve where the collision occurred. Defendant argues that the finding of the court is contrary to the manifest weight of the evidence; that plaintiff was not in the exercise of ordinary care; that in permitting the shrubbery and trees at the curve of the driveway to obscure vision raises a presumption of negligence and a want of due care; and that the plaintiff was further negligent in not posting a sign or giving instructions to persons using the driveway. All these contentions resolve themselves into questions of fact which the trial court was

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The several grounds for reversal all relate to questions of fact involving the relative negligence of the parties and their exercise of ordinary care in driving around the curve where the collision occurred. Defendant argues that the finding of the court is contrary to the manifest weight of the evidence; that plaintiff was not in the exercise of ordinary care; that in permitting the shrubbery and trees at the curve of the driveway to obscure vision raises a presumption of negligence and a want of due care; and that the plaintiff was further negligent in not posting a sign or giving instructions to persons using the driveway. All these contentions require themselves into questions of fact which the trial court was

in a better position to determine than an appellate tribunal. Defendant had been making deliveries to plaintiff's residence for four years, and must have been fully cognizant with the typography of the driveway and the danger presented by the shrubbery at the curve where the accident occurred. The ultimate and determining question in the case is whether defendant was negligent in failing to keep to the right as he was leaving the circular portion of the driveway. The driveway at the point of impact was sixteen feet wide, which would have given defendant ample room to swing to the right and thus avert the collision. The trial judge who heard and had an opportunity to observe the witnesses was evidently of the opinion that defendant's negligence in failing to keep to the right was the proximate cause of the collision. The evidence adduced by the respective parties on this question is conflicting and we would not be justified in disturbing the finding of the trial judge and holding that it was contrary to the manifest weight of the evidence. The judgment should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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FREDERICK L. REGNERY,
Appellant,

v.

CHRIS-CRAFT BOAT SALES, Inc.,
a corporation, and JOHN P. RODI,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

305 I.A. 624

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Circuit court sustaining defendants' motion to strike the amended complaint and dismissing the cause. Briefly stated, the amended complaint alleged that in January, 1938, plaintiff purchased from John P. Rodi and Chris-Craft Boat Sales, Inc., a yacht, known as "Hawk II," and paid therefor the sum of $10,270; that subsequently defendants delivered a bill of sale to plaintiff and the yacht was shipped from its place of manufacture to Keith Boat Yards, in Chicago, and was there received about April 1, 1938; that on the date of its arrival plaintiff and Rodi, who was president of the Chris-Craft Boat Sales, Inc., took the yacht on a trial run into Lake Michigan, during which there developed certain vibrations, caused by improper adjustment of the engines, whereupon Rodi agreed on behalf of defendants to make the necessary repairs and adjustments; that pursuant to this agreement plaintiff delivered the yacht to defendants April 2, 1938, it being agreed that they would exercise due care and caution to safeguard the yacht while it was in their possession, and return it in good condition; that from April 2 to April 5, 1938, the yacht was moored in the basin on the north side of Navy pier in Chicago, and while in possession and control of defendants, and due to their negligence and failure to exercise due and proper care therefor, the yacht suffered considerable damage during the night of April 5th and 6th, by striking her port side against the dock and pier to which she was tied; that a portion of the dock gave way, causing the yacht to swing about and strike her starboard side

MR. JUSTICE FRANKS DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Circuit court sustaining defendants' motion to strike the amended complaint and dismissing the cause. Briefly stated, the amended complaint alleged that in January, 1938, plaintiff purchased from John F. Hodt and Chris-Craft Boat Sales, Inc., a yacht, known as "Hawk II," and paid therefor the sum of $10,270; that subsequently defendants delivered a bill of sale to plaintiff and the yacht was shipped from its place of manufacture to Keith Boat Yards, in Chicago, and was there received about April 1, 1938; that on the date of its arrival plaintiff and Hodt, who was president of the Chris-Craft Boat Sales, Inc., took the yacht on a trial run into Lake Michigan, during which there developed certain vibrations, caused by improper adjustment of the engines, whereupon Hodt agreed on behalf of defendants to make the necessary repairs and adjustments; that pursuant to this agreement plaintiff delivered the yacht to defendants April 2, 1938, it being agreed that they would exercise due care and caution to safeguard the yacht while it was in their possession, and return it in good condition; that from April 2 to April 5, 1938, the yacht was moored in the basin on the north side of Navy pier in Chicago, and while in possession and control of defendants, and due to their negligence and failure to exercise due and proper care therefor, the yacht suffered considerable damage during the night of April 5th and 6th, by striking her port side against the dock and pier to which she was tied; that a portion of the dock gave way, causing the yacht to swing about and strike her starboard side

against the dock and pier, with resultant damage to her hull, topsides, tail shafts, propellers and engines.

Defendants' assign the following ground in support of their motion to strike the amended complaint: "That plaintiff, in paragraph 9 of his amended complaint concludes that defendants were negligent in handling plaintiff's yacht, but failed to state specifically the manner in which they were negligent."

The principal question presented is whether plaintiff's amended complaint sufficiently states a cause of action in bailment for damage to his yacht. This raises the query whether in an action in bailment it is necessary for the bailor to plead specific acts of negligence on the part of the bailee. As a general rule, where goods delivered to a bailee are returned in a damaged condition, or not returned at all, the law presumes negligence on the bailee's part, unless he shows that the loss did not result from his negligence. In the recent case of Lederer v. Railway Terminal, 346 Ill. 140, suit was brought against a bailee for the loss of several cases of whisky, and in discussing the generally accepted rule of law applicable to cases of this kind, the court said (p. 145): "Where a bailor proves that he has stored goods in good condition with a bailee and they are returned to him damaged or not returned at all, the law presumes negligence on the part of the bailee unless he shows that the loss did not result from his negligence." The court pointed out as the reason supporting this rule that the bailor had no access to the warehouse and was not in posit on to know what caused the fire. "The whisky was deposited with (the bailee) in good condition and was damaged while in its possession. This proof made a prima facie case under the first and second counts of the declaration."

In Miles v. International Hotel Co., 289 Ill. 320, the guest of a hotel brought suit for damage sustained to personal property left with the innkeeper under a bailment, and in discussing the liability of the defendant, the court said (pp. 327, 328): "The weight of modern authority holds the rule to be that where the bailor has shown that

against the dock and pier, with resultant damage to her hull, topsides, tail shafts, propellers and engines.

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the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor has made out a prima facie case of negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault."

In Schaefer v. Safety Deposit Co., 281 Ill. 43, plaintiff sued for the loss of money left in a safety box which was in the exclusive possession and control of defendant. The court pointed out the circumstances and said that there appeared no reason to depart from the ordinary rule that, "where a bailee receives property and fails to return it the presumption arises that the loss was due to his negligence, and the law imposes upon him the burden of showing that he exercised the degree of care required by the nature of the bailment. *** To call upon the plaintiff, under such circumstances, to prove some specific act of negligence by which her money was lost, and which she must necessarily prove by defendant's employees, would impose upon her a practically impossible burden." Other cases to the same effect, cited in plaintiff's brief, are More v. Fisher, 245 Ill. App. 567, and McCurrie v. Hines Lumber Co., 178 Ill. App. 617.

The allegations of the amended complaint fall logically within the authorities cited. It is alleged that in accordance with the agreement between plaintiff and defendants, the plaintiff "*** delivered said yacht to the said John P. Rodi and Chris-Craft Boat Sales, Inc., for the purpose of making the repairs and adjustments agreed upon; that it was also further understood and agreed *** that the said Rodi and Chris-Craft Boat Sales, Inc., would exercise due care and caution to safeguard the said yacht while in their possession; and that while the yacht was in the possession and control of *** Rodi and Chris-Craft Boat Sales, Inc., for the purpose of making the repairs and adjustments agreed upon, damage resulted."

Defendants seek to avoid the legal effect of the presumption cast upon them by arguing that the amended complaint fails to allege that the yacht was delivered into the exclusive possession of the

the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor has made out a prima facie case of negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault."

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The allegations of the amended complaint fail identify within the authorities cited. It is alleged that in accordance with the agreement between plaintiff and defendants, the plaintiff "*** delivered said yacht to the said John P. Hodt and Chris-Craft Boat Sales, Inc., for the purpose of making the repairs and adjustments agreed upon; that it was also further understood and agreed *** that the said Hodt and Chris-Craft Boat Sales, Inc., would exercise due care and caution to safeguard the said yacht while in their possession; and that while the yacht was in the possession and control of *** Hodt and Chris-Craft Boat Sales, Inc., for the purpose of making the repairs and adjustments agreed upon, damage resulted."

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bailees, but the allegations hereinbefore set forth clearly rebut this contention; no other reasonable meaning can be taken from the averments of the amended complaint.

It is also argued that "where it affirmatively appears from the complaint that plaintiff has knowledge concerning the cause of the damage to goods delivered to defendant and returned to plaintiff in a damaged condition, no cause of action is stated unless the negligence of the defendant is specifically alleged in the complaint." Plaintiff does allege general negligence, and presumably that is as much as he is required to allege under the law and circumstances of this case. It is averred that he delivered the yacht to defendants as bailees; that it was tied to their pier and damaged because of the force of wind and sea, which caused the yacht to swing around and strike the side of the dock. Presumably plaintiff had no specific knowledge as to the cause of the loss, but only as to the resulting damage. Under the authorities the presumption of negligence arises and the burden is cast upon defendants to show that they were not negligent. Such a showing could only be made upon a hearing of the issues.

Lastly, it is argued that defendants are exempted from liability because the damage was due to violence or natural causes. It seems to us, however, that since defendants were engaged in the business of the sale and repair of watercraft, and presumably knew the perils which may befall a yacht improperly anchored or tied, they may well be guilty of negligence, where the yacht is subjected to damage by reason of natural causes such as wind, tide or heavy sea, unless they can show by competent evidence that they were not negligent.

We think the court erred in sustaining defendants' motion to strike and in dismissing the amended complaint. The order of the Circuit court is therefore reversed and the cause remanded, with directions to overrule defendants' motion to strike, and for such other proceedings as are consistent with the views herein expressed.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

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REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

41026

LESSING ROSENTHAL, F. HOWARD ELDRIDGE, WILLARD L. RING and SIDNEY ROBIN, as surviving partners of the firm and copartnership of ROSENTHAL, HAMILL & WORMSER,

Appellees,

v.

PAUL C. LOEBER,

Appellant.

) APPEAL FROM MUNICIPAL COURT OF CHICAGO.

305 I.A. 624

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order of the Municipal court denying his motion to vacate a default judgment for $1,337.47 and costs, entered in favor of the several plaintiffs as surviving partners of the firm of Rosenthal, Hamill & Wormser.

Suit was brought on a promissory note executed by defendant February 27, 1932. Summons issued April 20, 1939, the return thereon reciting that defendant had been personally served. Judgment was entered in favor of plaintiffs and against defendant on April 28, 1939. More than two months later defendant, pursuant to notice, filed his verified petition to vacate the judgment, wherein he set forth at length what purported to be a meritorious defense to the note, denied that service had been had upon him, prayed that the judgment be vacated, that he be granted leave to file his appearance and defense and heard concerning his rights in the premises. The court denied the petition and defendant has taken an appeal.

Aside from the contention that he had a meritorious defense, the sole ground urged for reversal is that "a judgment obtained by means of a false return by an officer, without notice to defendant, will be set aside by a court of equity, where it is shown that the judgment is inequitable and unjust."

It is argued that defendant was entitled to all the relief

MARTIN ROSENTHAL, T. HOWARD MARTINSON, WILLARD I. KING and [illegible], as surviving partners of the firm and copartnership of ROSENTHAL, MARTIN & KING,

Respondents,

v.

PAUL C. LORENZ,

Appellant.

) APPEAL FROM MUNICIPAL
) COUNTY OF CHICAGO.



MR. JUSTICE MICHED DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order of the Municipal court denying his motion to vacate a default judgment for $1,337.47 and costs, entered in favor of the several plaintiffs as surviving partners of the firm of Rosenthal, Martin & Kormser.

Suit was brought on a promissory note executed by defendant February 27, 1932. Summons issued April 20, 1939, the return thereon reciting that defendant had been personally served. Judgment was entered in favor of plaintiffs and against defendant on April 28, 1939. More than two months later defendant, without to notice, filed his verified petition to vacate the judgment, wherein he set forth at length what purported to be a meritorious defense to the note, denied that service had been had upon him, prayed that the judgment be vacated, that he be granted leave to file his appearance and defense and heard concerning his rights in the premises. The court denied the petition and defendant has taken an appeal.

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It is argued that defendant was entitled to all the relief

in the Municipal court that he would have been entitled to had he filed a complaint in equity, and that the Municipal court had jurisdiction under section 21 of the Municipal Court Act (chap. 37, par. 376, Illinois State Bar Stats. 1939, p. 1062), after the expiration of thirty days to vacate and set aside the judgment and afford defendant a hearing on the merits.

The difficulty with the argument advanced is that the petition makes no showing that the judgment was obtained without notice to defendant, or that it was inequitable or unjust. The allegation as to lack of service is stated as a legal conclusion. No facts are set forth tending to support it. It is not alleged that defendant did not have knowledge of the service reported by the bailiff on his return, nor when defendant first learned of the pendency of the suit or the entry of the judgment, or that defendant exercised due diligence, either before or after the judgment was entered. Defendant merely sets forth the bare conclusion that he was not served, but the bailiff's return shows personal service upon him. Furthermore, plaintiffs' counsel say in their brief that defendant had knowledge of the suit following the bailiff's visit, "because we have a letter signed by defendant requesting a continuance before the judgment was entered." They offer in their brief to produce the letter in evidence under section 92d, par. 216, of the Practice Act (Ill. State Bar Stats. 1939, chap. 110), but we do not think it necessary to permit the introduction of this letter. The law is well settled that the right of a court of equity or of the Municipal court, under section 21 of the act, to set aside a judgment obtained on the basis of an alleged false return of the sheriff ends after the term, unless the false return has been procured by the fraud of the plaintiff. The case of Travelers Insurance Co. v. Wagner, 279 Ill. App. 13, is precisely in point. In that proceeding judgment was entered February 16, 1934. April 6 of that year defendant filed a petition to vacate the judgment pursuant to the provisions of the Civil Practice act, which gave the trial court the same power to grant equitable relief

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with respect to judgments as is given the Municipal court by section 21 of the Municipal Court Act. The prayer of the petition was granted and the judgment was vacated. Thereafter the case was dismissed for want of prosecution and an appeal was taken. The petition in that case, among other ground for relief, alleged that the sheriff's return did not show correctly the date on which summons was served. The court held that the petition was not sufficient, and said that "parties are bound by the sheriff's return after the term is ended in which judgment is entered unless a false return has been procured by the fraud of plaintiff."

In the case at bar the question of the meritorious defense was not in issue. Petitioner merely stood upon his legal rights and contended that the court did not have jurisdiction over him. Neither in this case nor in Travelers Ins. Co. v. Wagner, supra, was there any showing that defendant was not guilty of negligence or laches, and therefore the conclusion reached in the latter decision is applicable to the case at bar.

In the leading case of Chapman v. The North American Life Ins. Co., 292 Ill. 179, defendant, after the expiration of the term sought to prove that the sheriff's return did not state the facts. The court refused to entertain the petition, and said (p. 187): "In this State, before judgment is taken the sheriff's return can be contradicted when a false return is taken advantage of by a plea in abatement, or, more properly speaking, by a plea to the jurisdiction of the court of the person of the defendant. (Sibert v. Thorp, 77 Ill. 43.) All the cases will be readily distinguished that have been cited to us on the question of a sheriff's return, by noting that after judgment has been rendered, and after the term has ended in which judgment was rendered, the sheriff's return is conclusive as between the parties and cannot be taken advantage of by error coram nobis unless such false return has been procured by the fraud of the plaintiff."

Under the established rule in equity the court may afford

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In the leading case of Dunham v. The Berlin Accident Ins. Ins. Co., 292 Ill. 179, defendant, after the expiration of the term sought to prove that the sheriff's return did not state the facts. The court refused to entertain the petition, and said (p. 189): "In this state, before judgment is taken the sheriff's return can be contradicted when a false return is taken advantage of by a plea in abatement, or, more properly speaking, by a plea to the jurisdiction of the court of the person of the defendant. (Gibert v. Thorp, 77 Ill. 43.) All the cases will be readily distinguished that have been cited to us on the question of a sheriff's return, by noting that after judgment has been rendered, and after the term has ended in which judgment was rendered, the sheriff's return is conclusive as between the parties and cannot be taken advantage of by error coram nobis unless such false return has been procured by the fraud of the plaintiff."

Under the established rule in equity the court may afford

relief in a proper case against a judgment at law, but it must first appear that the party complaining has not been guilty of negligence or laches, and that he has been prevented from interposing a defense through accident, fraud or mistake, without fault or blame on his part (Higgins v. Bullock, 73 Ill. 205; Owens v. Ranstead, 22 Ill. 161; Stasel v. The American Home Security Corporation, 362 Ill. 350), and the same rule is applicable to petitions filed under section 21 of the Municipal Court Act.

Moreover, under the well established rule in this and other jurisdictions, the return of service by a sworn officer will not be lightly set aside on the basis of the oath of the one who is alleged to have been served. The proper method of hearing petitions under section 21 of the Municipal Court Act, where an attack is made upon the service of the bailiff, is to furnish supporting affidavnts of the circumstances. (Domitski v. American Linseed Co., 221 Ill. 161; White Oak Coal Co. v. Beck, 176 Ill. App. 86.) This rule has been repeatedly approved in this State in proceedings of this nature since the early case of Brown v. Brown, 59 Ill. 315.

We are of opinion that because of the failure of petitioner to allege facts in his petition entitling him to relief, as well as his failure to offer supporting affidavits, the petition was properly denied, and the order of the Municipal court is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

relief in a proper case against a judgment at law, but it must first appear that the party complaining has not been guilty of negligence or laches, and that he has been prevented from interposing a defense through accident, fraud or mistake, without fault or blame on his part (Mattice v. Mullaney, 73 III. 307; Lewis v. Sunstrom, 20 III. 161; Ritzwal v. The American Home Security Corporation, 262 III. 590), and the same rule is applicable to petitions filed under section 21 of the municipal court act.

Moreover, under the well established rule in this and other jurisdictions, the return of service by a sworn officer will not be lightly set aside on the basis of the oath of the one who is alleged to have been served. The proper method of bringing petitions under section 21 of the Municipal Court Act, where an attack is made upon the service of the bailiff, is to furnish supporting affidavits of the circumstances. (Goldfeld v. Western Stamped Co., 201 III. 161; Little Oak Coal Co. v. Hall, 176 III. App. 86.) This rule has been repeatedly approved in this State in proceedings of this nature since the early case of Brown v. Brown, 39 III. 319.

We are of opinion that because of the failure of petitioner to allege facts in his petition entitling him to relief, as well as his failure to offer supporting affidavits, the petition was properly denied, and the order of the Municipal court is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

40501

ISORA McNULTY,
Appellee,

v.

LEWIS A. REINERT and ROBERT CLARKE, doing business as the ALEXANDRIA HOTEL,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

12-B-A

305 I.A. 625

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in tort for personal injuries suffered by plaintiff while a passenger in a passenger elevator of defendants in the Alexandria hotel, in Chicago. A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at $7,500. Defendants appeal.

Defendants contend: "The doctrine of res ipsa loquitur raises only a presumption or inference of negligence which vanishes entirely when any evidence appears to the contrary. Any such presumption was clearly rebutted in the case at bar and the trial court should have directed a verdict for the defendants at the close of all the evidence."

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant [plaintiff]. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489."

IRMA BRADLEY,
Appellee,

v.

LEON E. MOSKOWITZ and
ROBERT CLARKE, doing business
as the ALEXANDRIA HOTEL,
Appellants.

APPEAL FROM MUNICIPAL COURT,
COOK COUNTY.



MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in tort for personal injuries suffered by plaintiff while a passenger in a passenger elevator of defendants in the Alexandria hotel, in Chicago. A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at $7,500. Defendants appeal.

Defendants contend: "The doctrine of res ipsa loquitur raises only a presumption or inference of negligence which vanishes entirely when any evidence appears to the contrary. Any such presumption was clearly rebutted in the case at bar and the trial court should have directed a verdict for the defendants at the close of all the evidence.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant [plaintiff]. Zeas v. Zeas, 337 Ill. 414; Moore v. Keyroide, 288 Ill. 168; Lloyd v. Hunt, 271 Ill. 489."

(Hunter v. Troup, 315 Ill. 293, 296, 297.) See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597.

In support of their contention defendants do not cite any passenger elevator cases.

"There is no employment where the law demands a higher degree of care and diligence than in the construction and operation of passenger elevators. Their operation is necessarily to some extent dangerous. The control of the operator is absolute and the passenger is helpless as far as self-preservation is concerned. Powerful agencies of locomotion are employed while often the speed of travel is swift and the height attained is perilous. Therefore, the highest degree of human care and foresight is required of those engaged in either the construction or operation of passenger elevators and they are responsible for the slightest negligence." (Webb's The Law of Passenger and Freight Elevators (2d ed.), p. 7.)

In the reports of the Appellate courts and the Supreme court of this State many passenger elevator cases may be found.

In Hartford Deposit Co. v. Sollitt, 172 Ill. 222, the court said (p. 225): "Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed, and the instruction in this case, in alleging that the plaintiff was in the elevator for the purpose of being carried from one floor to another, and that the elevator, owing to its negligent and faulty construction

(Hunter v. Tenn, 145 Ill. 273, 286, 277.) See, also, Wilson v. Hamburgen, 284 Ill. 439, 441; Donovan v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Bolster v. Curtiss Candy Co., 273 Ill. App. 366, 377.

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In Burford Foundry Co. v. Phillips, 172 Ill. 222, the court said (p. 227): "Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the cause was out of repair or faulty construction, and the instruction in this case, in alleging that the plaintiff was in the elevator for the purpose of being carried from one floor to another, and that the elevator, owing to its negligent and faulty construction

or to the negligence and carelessness on the part of the servants in operating the same, fell, and caused an injury to the plaintiff, stated a correct proposition of law, and stated a liability for causes alleged by the counts of this declaration." (Italics ours.)

In Springer v. Ford, 189 Ill. 430, the court said (pp. 434, 435, 436):

"At the close of the plaintiff's testimony, and again at the close of all the testimony, the defendant moved the court to instruct the jury to find the defendant not guilty, which the court declined to do, and the action of the court in that behalf has been assigned as error.

"The law is well settled that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers. [Citing cases.] * * *

"The operators of such elevators, upon the grounds of public policy, are required to exercise the highest degree of care and diligence. The lives and safety of a large number of human beings are entrusted to their care, and the law requires them to use extraordinary diligence in and about the operation of such elevators to prevent injury to passengers being carried therein. * * *

"When a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which the elevator is operated, the presumption of negligence from such breaking, unexplained, arises. In New York, Chicago and St. Louis Railroad Co. v. Blumenthal, 160 Ill. 40, we say on page 48: 'The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly, the law requires the plaintiff to show that the defendant has been negligent. But where the plaintiff is a passenger, a prima facie case of negligence is made out by showing the happening of the accident,

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"When a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which the elevator is operated, the presumption of negligence from such breaking, unexplained, arises. In Ker v. Chicago and St. Louis Railroad Co. v. Hinsenkamp, 160 Ill. 40, we say on page 45: 'The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly, the law requires the plaintiff to show that the defendant has been negligent. But where the plaintiff is a passenger, a prima facie case of negligence is made out by showing the happening of the accident.

if the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised.' And in Hartford Deposit Co. v. Sollitt, supra, it is said (p. 225): 'The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed.'" (Italics ours.)

In Steiskal v. Field & Co., 238 Ill. 92, the court said (p. 98): "This court has held (Hartford Deposit Co. v. Sollitt, 172 Ill. 222, and Springer v. Ford, supra,) that a person operating a passenger elevator under the circumstances under which the elevator in question was being operated at the time of the accident is a carrier of persons and bound to exercise a high degree of care in transporting passengers, and that the fact that the elevator falls when persons are being carried thereon is evidence that the elevator was mismanaged or was out of repair or of faulty construction." (Italics ours.) See, also, Chicago Exchange Building Co. v. Nelson, 197 Ill. 334, 339; Reidler v. Branshaw, 200 Ill. 425, 429.

It follows from the aforesaid decisions that "the fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed."

Plaintiff lived at Waukesha, Wisconsin. The accident happened on the afternoon of May 3, 1936. She boarded the elevator on the fourth floor of the hotel with her daughter, Mary McNulty; her daughter's friend, Frank Bucci; her son, William McNulty; her husband, Joseph McNulty; her sister, Mrs. J. Evans; and Robert Schram, a minor child. Two guests in the hotel were also in the elevator. John Cullen was the operator of the elevator. He was a candy maker by trade and at the time of the trial had been employed for eight months as a candy maker. When he started working at the Alexandria hotel in March, 1936, as an elevator operator it was his first experience in operating an elevator.

If the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised.' ... and in Hartford Deposit Co. v. Schlitt, supra, it is said (p. 222): 'The fact of the failure of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed.' (Italics ours.)

In Bringhoff v. Kraft & Co., 98 Ill. 92, the court said (p. 95): "This court has held (Hartford Deposit Co. v. Schlitt, 179 Ill. 222, and Springer v. Ford, supra,) that a person operating a passenger elevator under the circumstances under which the elevator in question was being operated at the time of the accident is a carrier of persons and bound to exercise a high degree of care in transporting passengers, and that the fact that the elevator falls upon persons who are being carried thereon is evidence that the elevator has disappeared or was out of repair or of faulty construction." (Italics ours.) See, also, Chicago Telephone Building Co. v. Tolman, 197 Ill. 324, 327; Schlitt v. Stanley, 80 Ill. 447, 450.

It follows from the aforesaid decisions that the fact of the failure of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faulty constructed."

Plaintiff lived at Waukegan, Wisconsin. The accident happened on the afternoon of May 3, 1936. She boarded the elevator on the fourth floor of the hotel with her daughter, Mary Kenilly; her daughter's friend, Frank Dwenji; her son, William McKinley; her husband, Joseph McKinley; her sister, Mrs. L. Evans; and Robert Gorman, a minor child. Two guests in the hotel were also in the elevator. John Sullivan was the operator of the elevator. He was a candy maker by trade and at the time of the trial had been employed for eight months as a candy maker. When he started working at the Alexandria hotel in March, 1936, as an elevator operator it was his first experience in operating an elevator.

Sometime after the accident - date not fixed - he was employed by defendants in the hotel as a "bell hop." Plaintiff and her party intended to leave the elevator on the first, or lobby floor, and one of the party requested Cullen to let them off at that floor. All of the passengers desired to alight at that floor. From the time that plaintiff got on the elevator until it struck the bottom of the shaft in the basement it did not stop, although persons desired to get on the elevator at the third floor, and Cullen admitted that he "had room for a couple more or so." The great preponderance of the evidence shows that after Cullen released the control at the fourth floor the elevator descended with rapidly increasing force until it hit the bottom of the shaft. One of plaintiff's witnesses testified that it hit the bottom with "a terrific crash." Another testified that it was like "hitting up against a cement wall," "a very hard blow," that "jarred" the witness. Another testified that when it hit the bottom it seemed to her that they "were going through the floor." Another testified that "we struck the bottom very hard. * * * When the elevator hit the bottom it just felt like something had pushed my head and neck down to my feet." One of plaintiff's witnesses testified that as the elevator was descending Cullen "switched the control back into reverse and it had no effect. It increased in momentum at the same time. * * * The control seemed to shift a little bit, as he moved it into reverse, and then he moved it back into high, and as he moved it back into reverse it had no effect." Another witness for plaintiff testified that as they were descending she saw the elevator operator "shake" the lever, but "the car just shook us and the car just kept going faster and faster and faster until we landed." Another witness for plaintiff testified that as the elevator reached the third floor there was a passenger waiting there to get on and Cullen tried to stop the elevator; that "he shifted the control lever on the elevator, and we just continued. The elevator man moved the lever horizontally. * * * The elevator just continued to drop on; it did not stop. * * * It was at the third floor where he

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tried to operate the elevator. The elevator just made a shuddering motion and continued to lower;" that the speed increased on the way down until it stopped at the bottom. Cullen, testifying for defendant, stated that plaintiff and her party got on the elevator at the fifth floor; that as the elevator left the fifth floor it started up gradually and increased its speed a certain amount; that it could be stopped in three or four feet; that he did not touch the control lever until the elevator was three or four feet above the lobby floor and that the elevator could be stopped at that floor in that distance; that when he broke the contact the car slackened somewhat and the brakes held; that the power was not off entirely until the car went into the basement; that when the elevator got to the bottom "the car stopped on the bumpers. There was a very slight jar and I attempted to raise the car again and found that my support was broken and I couldn't raise the car and so I opened my doors and let the passengers out. * * * I went around to get the car in operation, with the engineer;" that he came down and assisted by "the other bell boy" they moved "the cable back over onto the groove in the drum. * * * We had a rod there to pry the cable back over into that groove and the circuit had to be made at that time;" that the engineer held in the circuit breaker "and I was in the car at the throttle at the lever there;" that when the cable was forced back in the groove the car started up again; that it took "about five or ten minutes, not much longer," to restore the service. The following question was put to the witness: "Q. On this particular occasion, when you pulled this lever over did it break the contact? A. Well, it must have, <u>because I could not operate the car</u>. * * * I suppose the brake did not hold exactly tight enough to stop the car." The witness further testified that the governor regulates the safety dogs; that he understood how this was done "to a certain extent." He further testified: "I imagine it is a mechanical brake on there and when you throw your power off the brake holds. That's all I can figure out. That is when I pull the lever to the center. The contact with the motor, that runs the motor, should have broken, and when that breaks it cuts off the

tried to operate the elevator. The elevator just made a shuddering motion and continued to lower;" that the speed increased on the way down until it stopped at the bottom. Dullen, testifying for defendant, stated that plaintiff and her party got on the elevator at the fifth floor; that as the elevator left the fifth floor it started up gradually and increased its speed a certain amount; that it could be stopped in three or four feet; that he did not touch the control lever until the elevator was three or four feet above the lobby floor and that the elevator could be stopped at that floor in that distance; that when he broke the contact the car slackened somewhat and the brakes held; that the power was not off entirely until the car went into the basement; that when the elevator got to the bottom "the car stopped on the bumpers. There was a very slight jar and I attempted to raise the car again and found that my support was broken and I couldn't raise the car and so I opened my doors and let the passengers out. * * * I went around to get the car in operation, with the engineer;" that he came down and assisted by "the other bell boy" they moved "the cable back over onto the groove in the drum. * * * He had a rod there to pry the cable back over into that groove and the circuit had to be made at that time;" that the engineer held in the circuit breaker "and I was in the car at the throttle at the lever there;" that when the cable was forced back in the groove the car started up again; that it took "about five or ten minutes, not much longer," to restore the service. The following question was put to the witness: "Q. On this particular occasion, when you pulled this lever over did it break the contact? A. Well, it went down, because I could not operate the car. * * * I suppose the brake did not hold exactly tight enough to stop the car." The witness further testified that the governor regulates the safety cage; that he understood how this was done "to a certain extent." The witness further testified: "I imagine it is a mechanical brake on there and when you turn your power off the brake holds. That's all I can figure out. That is when I pull the lever to the center. The contact with the motor, that runs the motor, should have broken, and when that broke it took off the

motor and puts this brake into operation. It did on this particular occasion. The brake held. That's what slowed the car down. That's what allowed your car to settle. The motor kept on going because there was no power on the motor. As I said before, there is a mechanical brake on there that will hold when the motor is shut off. When the contact isn't broken the brake doesn't hold and the car keeps on going. On this particular occasion it must have broken the contact because I couldn't operate the car. The car did not stop. I suppose the brake did not hold tight enough to stop the car. It did not hold tight enough to stop the car to a dead stop. The power was off the motor when I threw the switch off. The brake held to a certain extent. It allowed the car to drift, to settle. That is not a bad drift. The car just settled slowly." Cullen, also testified that the elevator, besides being equipped with the regular control lever, was equipped with a baby switch, and that when that switch was pulled it would cut the line, cut off the power, and set the brake; that when he started work at the hotel the engineer of the hotel told him how to operate the car and how to operate the baby switch; that when the engineer used the baby switch it stopped the car; that said switch is located right under the main control, but that he did not work the baby switch at the time of the accident because he knew that if he used it it would throw the power completely off and the elevator "would probably be stuck between the floors and have to get an engineer" to put the elevator in service again. After carefully considering all of the evidence bearing upon the accident we have reached the conclusion that the jury would be fully justified in finding from the evidence want of care in the management of the elevator by the operator, that the elevator was out of repair, and that both of said causes contributed to bring about the accident. In our judgment no honest, intelligent jury could have found a verdict in favor of defendants under the facts and circumstances in evidence.

Defendants contend that the court erred in giving to the jury

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Defendants contend that the court erred in giving to the jury

plaintiff's instruction number 6, which reads: "(6) The court instructs the jury that if you believe from the evidence in this case, that the plaintiff on or about the 3rd day of May, 1936, was rightfully in an elevator in the possession of and operated by the defendants and situated in the Alexandria Hotel, for the purpose of being carried thereby from one of the upper floors of said building to the ground floor thereof; and if you further believe from the evidence that while the plaintiff was so in such elevator, and in the exercise of reasonable and ordinary care for her own safety, said elevator fell in the shaft of said elevator and violently struck against the bottom of said shaft; and if you further believe from the evidence that the plaintiff was thereby injured as charged in the complaint, then the burden would be upon the defendants to prove by the evidence, that the defendants could not have prevented said accident by the exercise of the highest degree of care, consistent with the practical prosecution of their business and the mode of conveyance adopted." (Italics ours.) Defendants complain of that part of the instruction that we have italicized. We find no merit in the contention.

In Elgin, Aurora & Southern Traction Co. v. Wilson, 217 Ill. 47, the court said (pp. 51, 52): "The appellant company is a common carrier of passengers for hire. The appellee became a passenger on one of its cars. The rule of liability is that applicable to the relation of carrier and passenger. Proof that the appellee was a passenger, that the car in which she was riding collided with another car and that she was injured, no negligence appearing on her part, made a prima facie case of negligent failure on the part of the appellant to discharge the duty it owed to her, and entitled her to recover damages for the injuries sustained by her unless the appellant company, by proof, should acquit itself of the presumption that the collision was in some way occasioned by its failure to discharge its duty as a public carrier to the appellee, as its passenger. [Citing cases.] * * * The doctrine to be deduced from the above cases is,

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In Kirin, Amore & Southern Traction Co. v. Adams, 147 Ill. 47, the court said (pp. 51, 52): "The appellant company is a common carrier of passengers for hire. The appellee became a passenger on one of its cars. The rule of liability is that applicable to the relation of carrier and passenger. Proof that the appellee was a passenger, that the car in which she was riding collided with another car and that she was injured, no negligence appearing on her part, made a prima facie case of negligent failure on the part of the appellant to discharge the duty it owed to her, and entitled her to recover damages for the injuries sustained by her unless the appellant company, by proof, should account slightly of the presumption that the collision was in some way occasioned by its failure to discharge its duty as a public carrier to the appellee, as its passenger. [Citing cases.] * * * The doctrine is to be deduced from the above cases is,

that when one becomes a passenger on a car of a common carrier to be transported from one station on its line to another, and has paid a consideration therefor, the contract on the part of the carrier is to provide safe and sound cars, track and necessary appliances to carry the passenger to his or her destination without injury. Where such a passenger is injured by a collision, proof of the relation of passenger and carrier, of the collision and the injury, if no contributing negligence on the part of the passenger appears, makes a prima facie case for the resulting damages, and casts upon the common carrier the onus of proving that the injury resulted from inevitable accident or from some cause against which human prudence and foresight could not have provided." (Italics ours.) See, also, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 331, 332, where an instruction like the instant one was approved. In Styburski v. Riverview Park Co., 298 Ill. App. 1 (decided by this division of the court), Mr. Justice Sullivan cites numerous cases bearing upon the doctrine of res ipsa loquitur, and holds that in an action by a patron of an aerial ride at an amusement park for injuries sustained when a cable broke, where there was no intimation that the plaintiff was at fault, and a prima facie case of negligence having been established by the facts of the occurrence and the injury to plaintiff, under the doctrine of res ipsa loquitur, the burden of proof was upon defendant to show that the accident was without its fault, and that the question whether the prima facie case of negligence was overcome by defendant's evidence was one of fact for the jury. A petition for leave to appeal from our judgment was denied by the Supreme court (ib. xvi).

In support of their contention that the italicized portion of the instruction was erroneous defendants cite, as "the leading case in this State," Bollenbach v. Bloomenthal, 341 Ill. 539. That case has no bearing upon the instant contention. There, plaintiff sued defendants, dentists, for alleged malpractice. The plaintiff tried the case upon the theory that the doctrine of res ipsa loquitur applied in such a case. The court said (pp. 542 & 546):

that when one becomes a passenger on a car of a common carrier to be transported from one station on its line to another, and has paid a consideration therefor, the contract on the part of the carrier is to provide safe and sound cars, track and necessary appliances to carry the passenger to his or her destination without injury. Where such a passenger is injured by a collision, proof of the relation of passenger and carrier, of the collision and the injury, if no contributing negligence on the part of the passenger appears, makes a prima facie case for the resulting damages, and rests upon the common carrier the onus of proving that the injury resulted from inevitable accident or from some cause against which human precautions could not have provided." (Italics ours.) See, also, Delaney v. Co. v. Carroll, 205 Ill. 116, 121, 125, where an instruction like the instant one was approved. In Schwerdtfeger v. Silverman Bank Co., 98 Ill. App. 1 (decided by this division of the court), Mr. Justice Sullivan cites numerous cases bearing upon the doctrine of res ipsa loquitur, and holds that in an action by a patron of an aerial ride at an amusement park for injuries sustained when a cable broke, where there was no intimation that the plaintiff was at fault, and a prima facie case of negligence having been established by the facts of the occurrence and the injury to plaintiff, under the doctrine of res ipsa loquitur, the burden of proof was upon defendant to show that the accident was without its fault, and that the question whether the prima facie case of negligence was overcome by defendant's evidence was one of fact for the jury. A petition for leave to appeal from our judgment was denied by the Supreme court (ib. xvi).

In support of their contention that the italicized portion of the instruction was erroneous defendants cite, as "the leading case in this State," Bollenbach v. Bloomenthal, 241 Ill. 539. That case has no bearing upon the instant contention. There, plaintiff sued defendants, dentists, for alleged malpractice. The plaintiff tried the case upon the theory that the doctrine of res ipsa loquitur applied in such a case. The court said (pp. 542 & 544):

"The case proceeded to trial on the theory that the facts were sufficient to invoke the doctrine of res ipsa loquitur, and in affirming the judgment the Appellate Court has sustained the application of that doctrine. Defendants seriously contend that the doctrine of res ipsa loquitur is not applicable in this case, and our decision will rest upon the determination of this one question. * * * No case has been cited where the doctrine of res ipsa loquitur has been applied by this court as an aid to recovery in a malpractice suit," and the court held that the trial court erred in giving an instruction directing the application of the doctrine of res ipsa loquitur and in allowing plaintiff's attorney to argue it before the jury. Defendants also cite Barnes v. Danville Street Ry. Co., 235 Ill. 566, and call attention to the fact that the following instruction was there held to be erroneous (p. 572): "'The court instructs the jury that the happening of an accident to the car and proof that an injury to a passenger resulted therefrom during the course of his transportation, and proof that at the time of the accident, and just prior thereto, the passenger was himself in the exercise of due care and caution for his own safety, raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier.'" In the Barnes case the injury to the passenger was caused by a collision between a street car belonging to the defendant, in which the plaintiff, a passenger, was riding, and the locomotive of a steam railroad owned and operated by a different company. Under the facts of that case the instruction passed upon by the Supreme court was clearly erroneous. The Barnes case, under its facts, does not apply to the instant case.

Defendants contend that "the damage awarded by the jury is excessive and manifestly is the result of passion, prejudice or misconception." In this connection defendants contend that counsel for plaintiff was guilty of conduct that tended to create prejudice and passion in the minds of the jury and caused them to bring in a highly excessive verdict. Plaintiff's witness Dr. Scheele, who was her

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family physician and attended her before and after the accident in question, testified that he had signed a certain document shown him by defendants' counsel. He was then cross-examined at length in reference to the statements made in the document. When the cross-examination of the doctor was concluded the following occurred: "Mr. Spencer [attorney for plaintiff]: You may offer it now and I won't object to it. Mr. Farrell [attorney for defendants]: No, I will proceed in an orderly fashion and put it in evidence. Mr. Spencer: Will you put in the rest of this that you tore off before you handed it to the witness? Mr. Farrell: I object to the comment there. Mr. Spencer: Something that occurred in the presence of the jury. Mr. Farrell: Just a minute. I object to the comment and ask the jury to be instructed to disregard it. The Court: That statement that somebody tore something off, nothing in that. Mr. Spencer: It occurred right in the presence of the jury. Mr. Farrell: I object to that. Mr. Spencer: The court asked me if anything occurred. Mr. Burkhalter [attorney for defendants]: You are an experienced lawyer and should not do that. Mr. Spencer: You say that is not the truth? Mr. Burkhalter: You are too experienced to try to do that before the jury. The Court: That has not been offered in evidence. Mr. Spencer: All right. Mr. Burkhalter: It is unbecoming to you. Mr. Spencer: I am not asking counsel to approve my conduct, your Honor." The original document is incorporated in the record and it shows that the top part of the document has been torn off. What that part contained the record does not show. Mr. Spencer stated that counsel for defendants tore off a part of the document in the presence of the jury. It will be noted that the counsel for defendants did not deny that such was the fact, but proceeded to lecture Mr. Spencer and to accuse him of unbecoming conduct. If counsel for defendants did not tear off part of the document in the presence of the jury the statement of Mr. Spencer would injure plaintiff instead of defendants. The reasonable conclusion to be

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drawn from the record is that the upper part of the document was torn off by defendants' counsel in the presence of the jury. If there was nothing material upon the part torn off, counsel for defendants could have ended the matter, to the advantage of defendants, by offering to attach to the document the part torn off, when they introduced it. They did not see fit to follow such a procedure.

Were the damages assessed by the jury excessive, as defendants contend? Evidence for plaintiff tends to prove the following facts: Plaintiff, prior to the accident, had a small umbilical hernia, described as the size of the end of her thumb, or the size of a small Wisconsin hickory nut. This condition had existed since 1931. Between 1931 and the time of the accident the hernia had not increased in size, it did not cause plaintiff any pain or suffering, and she was not in any way disabled by it. Sometime after the accident the hernia became aggravated and enlarged and in September, 1936, it was three inches in diameter, and, still later, the size of an orange. Physicians testifying for plaintiff testified that an operation would ordinarily remedy such a condition but that plaintiff was a diabetic and an operation would not be advisable unless the hernia became strangulated. They further testified that if the hernia continued to get larger it could not be held in place. During the two years between the accident and the trial plaintiff suffered great pain. While an abdominal support gives her a measure of relief, as soon as the support is taken off the hernia begins to protrude and has to be pushed back into place before the support can be placed in position. Prior to the accident plaintiff was in good health, save for the diabetes, and was able to do the housework for a family of four. Since the accident she is unable to do any but certain light household duties. Defendants contend that the accident did not cause any aggravation of the hernia, and that "the medical evidence" clearly establishes that the hernia as it now exists was not caused by the accident. We think the jury were justified in finding from the evidence that the accident caused the aggravation. Plaintiff's son testified that when the elevator

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Were the damages assessed by the jury excessive, as defendants contend? Evidence for plaintiff tends to prove the following facts: Plaintiff, prior to the accident, had a small umbilical hernia, described as the size of the end of her thumb, or the size of a small Wisconsin history nut. This condition had existed since 1931. Between 1931 and the time of the accident the hernia had not increased in size, it did not cause plaintiff any pain or suffering, and she was not in any way disabled by it. Sometime after the accident the hernia became aggravated and enlarged and in September, 1936, it was three inches in diameter, and, still later, the size of an orange. Physicians testifying for plaintiff testified that an operation would ordinarily remedy such a condition but that plaintiff was a diabetic and an operation would not be advisable unless the hernia became strangulated. They further testified that if the hernia continued to get larger it could not be held in place. During the two years between the accident and the trial plaintiff suffered great pain. While an abdominal support gives her a measure of relief, as soon as the support is taken off the hernia begins to protrude and has to be pushed back into place before the support can be placed in position. Prior to the accident plaintiff was in good health, save for the diabetes, and was able to do the housework for a family of four. Since the accident she is unable to do any but certain light household duties. Defendants contend that the medical evidence "clearly establishes that the hernia as it now exists was not caused by the accident. We think the jury were justified in finding from the evidence that the accident caused the aggravation. Plaintiff's son testified that when the elevator

struck the basement his mother went to her knees, grabbed her side, screamed, "Oh, my God," and collapsed. Frank Bucci testified that after the elevator struck plaintiff was in a limp position on the floor of the elevator and that she screamed, "Oh, my stomach;" that she was semi-conscious as she was assisted out of the elevator. Mary McNulty testified that when the elevator struck the bottom her mother, as she fell, grabbed her abdomen and cried, "Oh, dad, my God." Plaintiff's husband testified that after the elevator struck the bottom plaintiff slumped completely down and that as he and Bucci took her out of the elevator she appeared to be unconscious. Plaintiff testified, "Just as we struck the bottom I had a terrific pain in my stomach; it felt to me as though something had torn in me." After plaintiff had reached her home in Waukesha Dr. Scheele examined her. She was then lying in bed on her back, and complained of her right shoulder, her back, and the hernia. He examined her right shoulder and found that it was tender and that there was a limitation of motion of the shoulder, and he "strapped her back up." He further testified that the hernia was practically the same size as it was previously; that plaintiff complained some about it, but upon his examination he could not find very much wrong. About a week after the accident he thought the hernia was larger and strapped it with adhesive tape to hold it in. After that time he saw plaintiff at intervals and made examinations of the hernia from time to time, but he could not see very much difference in the size during the year after the accident. Several times he renewed the adhesive tape to strap up the hernia. About six weeks after the accident he told her to have a belt made and to put it on every day to give support to hold the hernia in. He further testified that in March, 1938, the hernia had increased to the size of a "decent sized orange." Blanche Wilson testified that she fitted plaintiff to an abdominal support in September, 1936; that she found that plaintiff had an umbilical hernia about three inches in diameter. Dr. Adams examined plaintiff on March 9, 1937.

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He testified that when plaintiff was lying on the table there was an opening beginning at the navel and extending down along the line in the middle of the belly, so that four fingers could be placed in the opening; that when she was standing erect a mass would gradually come through the opening which attained the size of the doctor's fist; that plaintiff was suffering from a rupture; that when he re-examined her on May 9, 1938, he found the protrusion had increased somewhat in size. He also testified, in response to a hypothetical question based upon plaintiff's evidence, that the accident was, "with reasonable medical certainty, a sufficient cause to bring about and cause the increased size of the hernia." Both Dr. Scheele and Dr. Adams testified that an operation would remedy plaintiff's hernia if she were not a diabetic; that that condition would greatly increase the hazard of an operation to repair the hernia. Defendants' major argument is that the medical testimony supports their position that the fact that there was no immediate increase in the size of the rupture, as evidenced by the examination of Dr. Scheele, shows conclusively that no relationship existed between the subsequent increase in the size of the hernia and the accident. Dr. Mitchell was the only expert called by defendants. His testimony, at first blush, seems to support defendants' argument. But the answer of the doctor, upon which defendants rely, was in response to a hypothetical question based upon testimony most favorable to defendants. The question disregarded entirely the evidence introduced by plaintiff as to the great force with which the elevator struck the basement floor and the immediate effects that the shock had upon her. The doctor's answer is based upon the assumption that plaintiff received no shock and did not collapse at the time of the accident. Indeed, the question was so artfully drafted that the doctor testified that the accident described in the question could not have caused an aggravation of the preexisting hernia. The jury were justified in giving but little weight to such testimony.

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The evidence for plaintiff shows that when Dr. Scheele first examined the patient she was in bed, lying upon her back, and in such a position the hernia would not protrude very greatly at that time although the hernia internally may have been aggravated. As Dr. Scheele stated, "You would have to rupture the tissues there. It would take a certain time for the bowels and food inside to come through and form the hernia." Dr. Adams testified that it would be quite illogical to infer that the accident did not aggravate plaintiff's hernia because Dr. Scheele on the day after the occurrence found the hernia the same size as he had found it a year before. Most laymen are fairly familiar with hernias, and the jury would have been warranted, in view of all the evidence, in finding that the accident did aggravate the hernia, especially in view of the overwhelming evidence that when the elevator struck the bottom plaintiff held her abdomen and cried, "Oh, my stomach." Plaintiff testified, "Just as we struck the bottom I had a terrific pain in my stomach; it felt to me as though something had torn in me."

Plaintiff will have an umbilical hernia the size of a man's fist the rest of her life. Should strangulation of the hernia occur, such a condition would force her physician to take the great risk of an operation in an effort to save her life. While the abdominal support gives her relief, as soon as the support is taken off the hernia begins to protrude, and it has to be pushed back into place before the support can be again placed in position. We have carefully considered the question as to whether the damages awarded are excessive and we are unable to say that the amount awarded is excessive.

Defendants contend that they were prejudiced by a remark made by the attorney for plaintiff in his closing argument. During the closing argument of counsel for plaintiff the following occurred: "As big as a fist, Doctor Adams says - a man who is put up here in this community as an expert - counsel says for forty-two years - is that right? - 1896 - a man of the highest appearance - you saw him - couldn't be better. He tells you that there is a mass now as big as his fist; when this lady

The evidence for plaintiff shows that when Dr. Schoele first examined the patient she was in bed, lying upon her back, and in such a position the hernia would not protrude very greatly at that time although the hernia internally may have been aggravated. As Dr. Schoele stated, "You would have to rupture the tissues there. It would take a certain time for the bowels and food inside to come through and form the hernia." Dr. Adams testified that it would be quite illogical to infer that the accident did not aggravate plaintiff's hernia because Dr. Schoele on the day after the occurrence found the hernia the same size as he had found it a year before. Most laymen are fairly familiar with hernias, and the jury would have been warranted, in view of all the evidence, in finding that the accident did aggravate the hernia, especially in view of the overwhelming evidence that when the elevator struck the bottom plaintiff held her abdomen and cried, "Oh, my stomach." Plaintiff testified, "Just as we struck the bottom I had a terrific pain in my stomach; it felt to me as though something had torn in me."

Plaintiff will have an artificial hernia the size of a man's fist the rest of her life. Should strangulation of the hernia occur, such a condition would force her physician to take the great risk of an operation in an effort to save her life. While the abdominal support gives her relief, as soon as the support is taken off the hernia begins to protrude, and it has to be pushed back into place before the support can be again placed in position. We have carefully considered the question as to whether the damages awarded are excessive and we are unable to say that the amount awarded is excessive.

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stands up without her surgical belt on, that it protrudes out like that. What would you take to have that thing fastened on you? Mr. Farrell: I object to that as improper. The Court: I think any reference - Mr. Farrell: The jury has seen the doctor. The Court: Sustained." Defendants now complain of the remark, "What would you take to have that thing fastened on you?" It will be noticed that counsel for defendants cut short the court's comment on the objection, and that the counsel at the time appeared to be objecting to counsel for plaintiff's praise of Dr. Adams. Defendants' counsel seemed to be satisfied with the court's ruling and made no request that the jury should be instructed to disregard anything that plaintiff's counsel had stated. It further appears that in defendants' motion for a new trial no point was made as to the language now complained of, viz., "What would you take to have that thing fastened on you?" Counsel for plaintiff contends that defendants' counsel are in no position to complain of anything that he said during the trial, as they themselves were guilty of improper conduct upon a number of occasions during the proceedings. The record shows that there is merit in this contention of plaintiff's counsel. In any event, we find no force in defendant's contention, raised here for the first time, that the remark in question was sufficient in itself to warrant a reversal of the judgment.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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The judgment of the superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Wolfe, J., concur.

40511

G. S. ELLITHORPE,
Appellant,

v.

GLENN E. HOLMES,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.



MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in contract to recover for brokerage commissions. Defendant filed a written motion to strike the amended complaint and dismiss the cause upon the ground, inter alia, that the alleged cause of action was barred by the five-year statute of limitations. The trial court sustained the motion and dismissed the suit. Plaintiff appeals.

The amended complaint alleges that prior to March 12, 1937, defendant employed plaintiff, a licensed real estate broker, as exclusive real estate broker to negotiate for the sale, sublease, transfer, or other disposition of the interest of defendant in certain described real property located in Chicago; "that thereupon and thereafter the said defendant * * * confirmed in writing the said employment, in words and figures as follows:

"March 12th, 1927

"Mr. G. S. Ellithorpe,
"137 Merrill Avenue,
"Park Ridge, Illinois.

"Dear Sir:

"This will confirm our verbal understanding that you are to act as exclusive broker for my interests in the property located at numbers 22 to 36 West Lake Street, this city, and I hereby authorize you to negotiate for the sale, sub-lease, transfer or other disposition of same, it being understood that all terms or conditions of any negotiations are to be subject to my agreement in writing.

"Yours very truly,

"(signed) Glenn E. Holmes"

The complaint further alleges that pursuant to the said employment

No. 11

G. E. ELLITHORPE,
Appellant,

v.

GLENN E. JOHNSON,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

305 I.A. 625

MR. JUSTICE MCCARTHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in contract to recover for brokerage commissions. Defendant filed a written motion to strike the amended complaint and dismiss the cause upon the ground, inter alia, that the alleged cause of action was barred by the five-year statute of limitations. The trial court sustained the motion and dismissed the suit. Plaintiff appeals.

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"Yours very truly,

"(signed) Glenn E. Johnson"

The complaint further alleges that pursuant to the said employment

plaintiff negotiated for the disposition of defendant's interest in the property and that as a result of his services as such broker a contract of sale was entered into on November 26, 1927, between defendant and certain transferees, etc., of said interest, and thereafter on December 27, 1927, the transaction between the said parties was consummated. The complaint then sets up that the consideration for the transfer of the property was 208 shares of stock of the Dearborn-Lake Building Corporation, which was then and there of the market value of $250,000; that "the usual reasonable and customary brokerage commissions for the services performed by plaintiff aforesaid, on and about the months of November and December, 1927, was 3% computed on the basis of the value of the consideration of such sale, transfer and assignment as aforesaid, of $250,000, or $7,500 commission."

Plaintiff contends that "the writing sued upon is a written contract and that the five-year statute of limitations has no application," and that the ten-year statute of limitations applies. Defendant contends: "1. The obligation of the defendant on which recovery is sought is an implied promise to pay plaintiff the reasonable value of his services, hence an oral contract within the statute of limitations and barred by the lapse of five years. 2. The letter recited in the amended complaint is merely evidence of the employment of plaintiff by defendant but does not constitute a written contract between them within the meaning of the statute of limitations as distinguished from a written memorandum under the statute of frauds. The cause of action on which recovery is sought is based on the employment plus performance by the defendant which, by operation of law, entitles plaintiff to an action for commissions. The letter is of evidentiary value should defendant deny the employment, but the gravamen of the action is the implied obligation."

The original complaint was filed November 23, 1937. Plaintiff's cause of action as alleged in the amended complaint arose November 26, 1927. It seems plain to us that under the settled rule of law in this

plaintiff negotiated for the disposition of defendant's interest in the property and that as a result of his services as such broker a contract of sale was entered into on November 16, 1927, between defendant and certain transferees, etc., of said interest, and thereafter on December 27, 1927, the transaction between the said parties was consummated. The complaint then sets up that the consideration for the transfer of the property was 208 shares of stock of the Sandborn-Lake Building Corporation, which was then and there of the market value of $250,000; that "the usual reasonable and customary brokerage commissions for the services performed by plaintiff aforesaid, on and about the months of November and December, 1927, was 3% computed on the basis of the value of the consideration of such sale, transfer and assignment as aforesaid, of $250,000, or $7,500 commission."

Plaintiff contends that "the writing sued upon is a written contract and that the five-year statute of limitations has no application," and that the ten-year statute of limitations applies. Defendant contends: "1. The obligation of the defendant on which recovery is sought is an implied promise to pay plaintiff the reasonable value of his services, hence an oral contract within the statute of limitations and barred by the lapse of five years. 2. The letter recited in the amended complaint is merely evidence of the employment of plaintiff by defendant but does not constitute a written contract between them within the meaning of the statute of limitations as disclaimed from a written contract under the statute of frauds. The cause of action on which recovery is sought is based on the employment plus performance by the defendant which, by operation of law, entitles plaintiff to an action for commissions. The letter is of evidentiary value should defendant deny the employment, but the gravamen of the action is the implied obligation."

The original complaint was filed November 23, 1927. Plaintiff's cause of action as alleged in the amended complaint arose November 26, 1927. It seems plain to us that under the settled rule of law in this

State plaintiff's action was upon an implied contract and therefore the five-year statute of limitations applies. The letter set forth in the amended complaint confirms the employment of plaintiff as broker but makes no mention of compensation. Indeed, the amended complaint does not allege any promise by defendant, express or implied, to compensate plaintiff for the latter's services as real estate broker. But where brokers are employed to sell a piece of real estate there is an implied obligation to pay the customary and reasonable compensation for the services performed.

An action upon an implied contract must be brought within five years after the cause of action accrued. (Mowatt v. City of Chicago, 292 Ill. 578.) In that case the court said (p. 582): "In this State it has been held that if the action is brought upon a mere implied undertaking the five year Statute of Limitations controls. (Knight v. St. Louis, Iron Mountain and Southern Railway Co., 141 Ill. 110; Bates v. Bates Machine Co., 230 id. 619.) This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute. (Conductors' Benefit Ass'n v. Loomis, 142 Ill. 560.) The following authorities support same conclusion: 25 Cyc. 1042; 1 Wood on Limitations, (4th ed.) sec. 57f, and cases cited; Bishop on Contracts, secs. 197-203, incl.; 3 Page on Law of Contracts, (2d ed.) sec. 1500, and authorities cited; Dodd v. Board of Education, 122 Cal. 106." (See, also, Junker v. Rush, 136 Ill. 179, 184.)

The letter in the amended complaint is undoubtedly evidence of the transaction between the parties, but to establish his claim plaintiff would be obliged to introduce oral testimony to prove the reasonable and customary commission for services such as plaintiff performed. Defendant would then have the right to introduce oral testimony to rebut that offered by plaintiff. As stated in the Mowatt case (p. 582): "* * * a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action

State plaintiff's action was upon an implied contract and therefore the five-year statute of limitations applies. The letter set forth in the amended complaint confirms the employment of plaintiff as broker but makes no mention of compensation. Indeed, the amended complaint does not allege any promise by defendant, express or implied, to compensate plaintiff for the latter's services as real estate broker. But where brokers are employed to sell a piece of real estate there is an implied obligation to pay the customary and reasonable compensation for the services performed.

An action upon an implied contract must be brought within five years after the cause of action accrued. (Kenyon v. City of Oakland, 292 Ill. 378.) In that case the court said (p. 382): "In this State it has been held that if the action is brought upon a mere implied undertaking the five year statute of limitations controls. (Kohlsaat v. St. Louis, Iron Mountain and Southern Railway Co., 141 Ill. 110; Bates v. Bates Machine Co., 230 id. 619.) This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute. (Goodwillie Brewing Co. v. Lockhart, 141 Ill. 300.) The following authorities support some annotations 25 Cyc. 1042; 1 Wood on Limitations, (4th ed.) sec. 372, and cases cited; Bishop on Contracts, secs. 197-203, incl.; 3 Page on Law of Contracts, (2d ed.) sec. 1500, and authorities cited; Lodd v. Board of Commissioners, 122 Ind. 100." (See, also, Janney v. Dunn, 130 Ill. 179, 184.)

The letter in the amended complaint is undoubtedly evidence of the transaction between the parties, but to establish his claim plaintiff would be obliged to introduce oral testimony to prove the reasonable and customary commission for services such as plaintiff performed. Defendant would then have the right to introduce oral testimony to rebut that offered by plaintiff. As stated in the Kenyon case (p. 378): "* * * a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action

the contract is not in writing under this statute [statute of limitations]."

Plaintiff contends that the trial court committed reversible error in denying him the right to amend his amended complaint. It is conceded that the judgment of the trial court was predicated upon the ground that the five-year statute of limitations applied. Plaintiff had already filed an amended complaint. He did not submit to the trial court a second amended complaint and so far as the record shows no showing was made that plaintiff could have avoided the five-year statute by alleging a different cause of action arising out of the transaction in question, nor does plaintiff attempt to show this court how a second amended complaint would have aided his cause. He simply asserts that the action of the trial court wiped out his rights. In view of the record before us, we certainly would not be warranted in holding that the trial court committed reversible error in denying plaintiff's motion for leave to file a second amended complaint.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

the contract is not in writing under this statute [statute of limitations]."

Plaintiff contends that the trial court committed reversible error in denying him the right to amend his amended complaint. It is conceded that the judgment of the trial court was predicated upon the ground that the five-year statute of limitations applied. Plaintiff had already filed an amended complaint. He did not submit to the trial court a second amended complaint and so far as the record shows no showing was made that plaintiff could have avoided the five-year statute by alleging a different cause of action arising out of the transaction in question, nor does plaintiff attempt to show this court how a second amended complaint would have aided his cause. He simply asserts that the action of the trial court wiped out his rights. In view of the record before us, we certainly would not be warranted in holding that the trial court committed reversible error in denying plaintiff's motion for leave to file a second amended complaint.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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| PEOPLE ex rel. CHARLES DE LEUW & COMPANY, a Corporation, Plaintiff, v. VILLAGE OF MIDLOTHIAN, a Municipal Corporation, (Defendant) Appellant. | APPEAL FROM CIRCUIT COURT OF COOK COUNTY. |
| CHARLES DE LEUW & COMPANY, a Corporation, (Relator) Appellee. | |



MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Charles De Leuw & Company, a corporation (relator) filed a suit praying for a writ of mandamus to compel the Village of Midlothian to pay to it the amount of certain judgments in its favor against the village, or to appropriate any surplus in the general fund of the village, after providing for the most economical expenses of the village, to the payment of such judgments; to require the village authorities to levy the maximum amount of tax authorized by law and use any surplus over reasonable expenses in paying such judgments, or that such village authorities adopt an ordinance for a bond issue sufficient to pay the judgments and levy taxes to pay such bonds. After defendant filed an answer the relator filed a motion to strike certain paragraphs of the answer and for a judgment in accordance with the prayer of the petition. The trial court sustained the motion and entered a judgment commanding the village authorities to issue such bonds, to deliver them to petitioner, and to levy taxes for their payment. Defendant appealed directly to the Supreme court (People v. Village of Midlothian, 370 Ill. 223), but that court held that it had no jurisdiction of the appeal, and transferred the cause to this court.

The complaint states (1) that on January 23, 1936, plaintiff (relator) recovered a judgment against defendant, in the Circuit Court

PEOPLE ex rel. CHARLES DE LAWN
& COMPANY, a Corporation,
Plaintiff,

v.

VILLAGE OF ARLINGTON, a
Municipal Corporation,
(Defendant) Appellant.

CHARLES DE LAWN & COMPANY, a
Corporation,
(Relator) Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

3051 A. 626

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Charles De Lawn & Company, a corporation (relator) filed a suit praying for a writ of mandamus to compel the village of Arlington to pay to it the amount of certain judgments in its favor against the village, or to appropriate any surplus in the general fund of the village, after providing for the most economical expenses of the village, to the payment of such judgments; to require the village authorities to levy the maximum amount of tax authorized by law and use any surplus over reasonable expenses in paying such judgments, or that such village authorities adopt an ordinance for a bond issue sufficient to pay the judgments and levy taxes to pay such bonds. After defendant filed an answer the relator filed a motion to strike certain paragraphs of the answer and for a judgment in accordance with the prayer of the petition. The trial court sustained the motion and entered a judgment commanding the village authorities to issue such bonds, to deliver them to petitioner, and to levy taxes for their payment. Defendant appealed directly to the supreme court (People v. Village of Glenview, 378 Ill. 223), but that court held that it had no jurisdiction of the appeal, and transferred the cause to this court.

The complaint states (1) that on January 23, 1936, plaintiff (relator) recovered a judgment against defendant, in the Circuit Court

of Cook
county, for the sum of $9,621.55 and for $19.60 costs; (2) that on March 30, 1937, it recovered a judgment against defendant, in the Appellate court of Illinois, First District, for $10 costs; (3) that in October, 1937, it recovered a judgment against defendant for $10 costs in the Supreme court of the State of Illinois; (4) that no part of said several judgments has been paid and that there remains due and unpaid to relator from defendant on the judgment $9,621.55 and interest thereon at the rate of five per cent per annum from January 23, 1936, and the amount of the judgments for costs, $39.60; (5) that on May 11, 1937, relator demanded of defendant to pay the judgments recovered in the Circuit and Appellate courts and the demand stated that unless defendant made payment or took the necessary steps to make provision for the payment proceedings for mandamus would be had against defendant for its failure to perform its duty; (6) that on May 10, 1938, relator again demanded of defendant the payment of said judgments and also the judgment entered by the Supreme court, which demand was made in writing and delivered to defendant at a meeting of its president and board of trustees; (7) that relator has the right to be paid the said several judgments by defendant and that it is the duty of defendant to make the necessary appropriation and take the necessary steps and to perform the necessary acts to provide the funds to pay to relator its several judgments, with interest, as aforesaid; (8) that the total assessed valuation of all property in the village for the year 1937 was $590,889; that the total bonds outstanding and ever issued by the village were provided for by Ordinance No. 135 in the amount of $11,000; that said ordinance was passed February 13, 1935, and by the ordinance there were levied taxes to pay the bonds and interest in the years 1935 to 1946, inclusive, in the several respective amounts stated, totaling $15,675; that said bonds, by their terms, mature on November 1 in the years 1938 to 1948, inclusive; that defendant has in its treasury the sums paid to it from the tax levies for the years 1935, 1936 and 1937, applicable to the payment of the principal of said bonds; that defendant is authorized by law to issue

County, for the sum of $9,621.35 and for $19.60 costs; (2) that on March 30, 1937, it recovered a judgment against defendant, in the Appellate Court of Illinois, First District, for $10 costs; (3) that in October, 1937, it recovered a judgment against defendant for $10 costs in the Supreme Court of the State of Illinois; (4) that no part of said several judgments has been paid and that there remains due and unpaid to relator from defendant on the judgment $9,621.35 and interest thereon at the rate of five per cent per annum from January 23, 1936, and the amount of the judgments for costs, $29.60; (5) that on May 11, 1937, relator demanded of defendant to pay the judgments recovered in the Circuit and Appellate courts and the demand stated that unless defendant made payment or took the necessary steps to make provision for the payment proceedings for mandamus would be had against defendant for its failure to perform its duty; (6) that on May 10, 1938, relator again demanded of defendant the payment of said judgments and also the judgment entered by the Supreme court, which demand was made in writing and delivered to defendant at a meeting of its president and board of trustees; (7) that relator has the right to be paid the said several judgments by defendant and that it is the duty of defendant to make the necessary appropriation and take the necessary steps and to perform the necessary acts to provide the funds to pay to relator its several judgments, with interest, as aforesaid; (8) that the total assessed valuation of all property in the village for the year 1937 was $320,000; that the total bonds outstanding and ever issued by the village were provided for by Ordinance No. 135 in the amount of $11,000; that said ordinance was passed February 1, 1925, and by the ordinance there were levied taxes to pay the bonds and interest in the years 1925 to 1948, inclusive, in the several respective amounts stated, totaling $13,375; that said bonds, by their terms, mature on November 1 in the years 1938 to 1948, inclusive; that defendant has in its treasury the sums paid to it from the tax levies for the years 1935, 1936 and 1937, applicable to the payment of the principal of said bonds; that defendant is authorized by law to issue

its general obligation bonds in more than a sufficient amount to pay relator its said judgments, interest and costs; that relator is willing to accept the general obligation bonds of defendant, that may be legally issued, duly authorized by proper ordinance, in payment of its said judgments; (9) that a true copy of said judgment entered by the Circuit court of Cook county in favor of relator and against defendant, on January 23, 1936, as the same now appears of record in said court and remaining in full force and effect, is attached to the complaint and marked "Exhibit A;" (10) that attached to the complaint and made a part thereof and marked "Exhibit B," is a copy of the written demand made on defendant, on May 10, 1938, to pay said judgments. The complaint prays for summons and that a peremptory writ of mandamus may be issued directing and compelling the president and board of trustees of defendant, the village clerk and village treasurer forthwith, or as soon as practicable, to pay to relator its said judgments, with interest as aforesaid, or to appropriate such surplus that may remain in the general fund of the village, after providing for the most economical expenses of the village, out of that fund to the payment of principal and interest of relator's said judgments; that the president and board of trustees be required to levy annually the maximum tax authorized by law on all taxable property within the village for the general fund and any surplus of which, after paying out the reasonable expenses of the village, shall be applied to the payment of interest and principal of relator's judgments, or that said president and board, and defendant's other proper officers, be required to prepare and adopt an ordinance providing for the issuance of its general obligation bonds in sufficient amount to pay relator's said judgments, with interest thereon, and to take the necessary steps and perform the necessary acts to make said bonds, so to be issued pursuant to said mandate, the legal obligations of the village, and, at said time, to levy taxes for the payment thereof upon all the taxable property within the village sufficient to pay the principal and interest on said

its general obligation bonds in more than a sufficient amount to pay relator its said judgments, interest and costs; that relator is willing to accept the general obligation bonds of defendant, that may be legally issued, duly authorized by proper ordinance, in payment of its said judgments; (9) that a true copy of said judgment entered by the circuit court of Cook county in favor of relator and against defendant, on January 23, 1936, as the same now appears of record in said court and remaining in full force and effect, is attached to the complaint and marked "Exhibit A;" (10) that attached to the complaint and made a part thereof and marked "Exhibit B," is a copy of the written demand made on defendant, on May 1, 1936, to pay said judgments. The complaint prays for summons and that a peremptory writ of mandamus may be issued directing and compelling the president and board of trustees of defendant, the village clerk and village treasurer forthwith, or as soon as practicable, to pay to relator its said judgments, with interest as aforesaid, or to appropriate such surplus that may remain in the general fund of the village, after providing for the most economical expenses of the village, out of that fund to the payment of principal and interest of relator's said judgments; that the president and board of trustees be required to levy annually the maximum tax authorized by law on all taxable property within the village for the general fund and any surplus of which, after paying out the reasonable expenses of the village, shall be applied to the payment of interest and principal of relator's judgments, or that said president and board, and defendant's other proper officers, be required to prepare and adopt an ordinance providing for the issuance of its general obligation bonds in sufficient amount to pay relator's said judgments, with interest thereon, and to take the necessary steps and perform the necessary acts to make said bonds, so to be issued pursuant to said mandate, the legal obligations of the village, and, at said time, to levy taxes for the payment thereof upon all the taxable property within the village sufficient to pay the principal and interest on said

bonds at their maturity, and that relator may have such further order in the premises as justice may require.

The answer of defendant (1) admits the allegations contained in paragraphs 1 to 6, inclusive, of relator's petition; (2) as to the allegations contained in paragraph 7 defendant, by reason of the circumstances existing at the present time in defendant village, denies that it has the duty of making any appropriation to pay the judgments of relator; (3) admits the allegations contained in paragraph 8 except that defendant denies that it is authorized to issue its general obligation bonds in more than an amount sufficient to pay relator its said judgments; states that its present debts and obligations exceed the constitutional limits as to debts; (4) states that pursuant to an Act to provide for the incorporation of cities and villages, approved April 10, 1872, as amended, defendant may levy, for general corporate purposes, taxes not to exceed the rate of 2/3 of 1% upon the aggregate valuation of all property within defendant village as the same was equalized for state and county taxes for the current year; that the assessed valuation of all property in defendant village for the year 1937 is the sum of $590,889; that 2/3 of 1% of said assessed valuation is the sum of $3,939.26, and said latter sum is the total amount defendant may levy for general corporate purposes; that the necessary, reasonable and economical expenditures of defendant village exceed said sum of $3,939.26; that the revenues obtainable by defendant from sources other than the said tax levy, together with the taxes obtainable from said tax levy, have been and will be insufficient to pay the necessary, reasonable and most economical corporate expenditures of defendant village; (5) states that said petition is prematurely filed in that the petition for leave to appeal to the Supreme court of the State of Illinois for a review of the judgment of relator was not denied until the October, 1937, term of said court, "and under the said Act to provide for the incorporation of cities and villages as amended, and the first tax levy ordinance defendant could adopt subsequent to October, 1937, is the tax levy ordinance for the year 1938,

bonds at their maturity, and that relator may have such further order in the premises as justice may require.

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and pursuant to said Act said 1938 tax levy ordinance may be adopted at any time on or before the third Tuesday in September, 1938;" and defendant prays that said petition for mandamus may be dismissed at relator's costs.

Defendant contends: "I. It is mandatory upon the court to grant an application for a change of venue when the petition complies with the statutory requirements. II. Inasmuch as the question of whether bonds shall be issued by a municipality to fund its judgment debts is a matter within the discretion of the officials of the municipality, the courts cannot by mandamus compel the issuance of such bonds. III. A municipality cannot, for the purpose of funding judgments against it, issue bonds in the amount of such judgments where the aggregate of the bonds to be issued and the other indebtedness of the municipality (exclusive of said judgments) exceed five per cent of the assessed valuation of all the taxable property in the municipality, and where such judgments are based on involuntary liabilities."

Upon the oral argument counsel for defendant stated that it abandoned point III because of the decision in Elmhurst Bank v. Village of Bellwood, 372 Ill. 204. There the Supreme court held that an ordinance for the issuing of bonds to pay a judgment based on a tort claim, or an amount agreed upon in settlement of such judgment, is not invalid as increasing the municipality's aggregate indebtedness beyond the constitutional limit, as the bond issue merely evidences an already existing debt, nor is the ordinance invalid because the provision for a tax levy to pay the bonds makes the aggregate of taxes exceed the statutory limitation based on the property valuation. In that decision the court also calls attention to the fact that the statute (Ill. Rev. Stat. 1937, chap. 24, art. 5, par. 65.5, as amended in 1936) permits the funding of judgment debts by bond issues.

As to point I: The motion of plaintiff (relator) to strike certain paragraphs of the answer and for judgment was filed June 22, 1938. Defendant concedes that on the morning of June 23, 1938, it received notice of the motion, that it was set for hearing before

and pursuant to said Act said 1938 tax levy ordinance may be adopted at any time on or before the third Tuesday in September, 1938;" and defendant prays that said petition for mandamus may be dismissed at plaintiff's costs.

Defendant contends: "I. It is mandatory upon the court to grant an application for a change of venue when the petition complies with the statutory requirements. II. Inasmuch as the question of whether bonds shall be issued by a municipality to fund its judgment debts is a matter within the discretion of the officials of the municipality, the courts cannot by mandamus compel the issuance of such bonds. III. A municipality cannot, for the purpose of funding judgments against it, issue bonds in the amount of such judgments where the aggregate of the bonds to be issued and the other indebtedness of the municipality (exclusive of said judgments) exceed five per cent of the assessed valuation of all the taxable property in the municipality, and where such judgments are based on involuntary liabilities."

Upon the oral argument counsel for defendant stated that it abandoned point III because of the decision in Kimmerer Bank v. Village of Hollywood, 372 Ill. 204. There the Supreme court held that an ordinance for the issuing of bonds to pay a judgment based on a tort claim, or an amount agreed upon in settlement of such judgment, is not invalid as increasing the municipality's aggregate indebtedness beyond the constitutional limit, as the bond issue merely evidences an already existing debt, nor is the ordinance invalid because the provision for a tax levy to pay the bonds makes the aggregate of taxes exceed the statutory limitation based on the property valuation. In that decision the court also calls attention to the fact that the statute (Ill. Rev. Stat. 1937, chap. 24, sec. 2, par. 22, as amended in 1936) permits the funding of judgment debts by bond issues.

As to point I: The motion of plaintiff (relator) to strike certain paragraphs of the answer and for judgment was filed June 22, 1938. Defendant concedes that on the morning of June 23, 1938, it received notice of the motion, that it was set for hearing before

Judge Harry M. Fisher on June 24, 1938, at 10 a.m., and that the said motion was number seventeen on the said judge's motion call. No written notice that defendant would apply for a change of venue from Judge Fisher was served upon relator or its counsel nor was the relator orally notified that the application would be made. When the motion was called by Judge Fisher defendant presented to the court the petition for a change of venue. Counsel for relator then stated to the court that he had not seen the petition and had had no notice of any kind that it would be presented, and that he therefore objected to the granting of the petition. The court then denied the petition for a change of venue. The contention of defendant that it was mandatory upon the court to grant its application for a change of venue because the petition complied with the statutory requirements is without merit. See the recent case of People v. Meyering, 352 Ill. 436, where the court held that the statute requires notice to the opposite party of the proposed filing of a petition for a change of venue, and where no such notice is given the petition is properly overruled even though it alleges prejudice of the judge and that such prejudice was first known the day before the filing of the petition. The court further held that the fact that the assistant State's attorney appears and resists the petition is not a waiver of the requirement of notice. In the instant case the affidavit in support of the petition was subscribed and sworn to on June 23, 1938. The trial court was justified in assuming from certain parts of defendant's answer that it was seeking delay. Upon the oral argument in the instant case counsel for defendant admitted that the writ of mandamus would lie in the instant cause if defendant delayed the payment of the relator's judgment an "unreasonable time." Counsel further conceded that the trial court in passing upon relator's motion was required to pass solely upon a question of law, and that if its decision was correct defendant was not injured by the refusal of the trial court to grant the change of venue.

We are satisfied that there is no merit in point II. In People ex rel. Bunge v. Downers Grove San. Dist., 281 Ill. App. 426, the court

Judge Harry S. Fisher on June 24, 1938, at 10 a.m., and that the said motion was number seventeen on the said judge's motion call. No written notice that defendant would apply for a change of venue from Judge Fisher was served upon relator or its counsel nor was the relator orally notified that the application would be made. When the motion was called by Judge Fisher defendant presented to the court the petition for a change of venue. Counsel for relator then stated to the court that he had not seen the petition and had had no notice of any kind that it would be presented, and that he therefore objected to the granting of the petition. The court then denied the petition for a change of venue. The contention of defendant that it was mandatory upon the court to grant its application for a change of venue because the petition complied with the statutory requirements is without merit. See the recent case of People v. Meyering, 372 Ill. 436, where the court held that the statute requires notice to the opposite party of the proposed filing of a petition for a change of venue, and where no such notice is given the petition is properly overruled even though it alleges prejudice of the judge and that such prejudice was first known the day before the filing of the petition. The court further held that the fact that the assistant State's attorney appears and resists the petition is not a waiver of the requirement of notice. In the instant case the affidavit in support of the petition was subscribed and sworn to on June 23, 1938. The trial court was justified in assuming from certain parts of defendant's answer that it was seeking delay. Upon the oral argument in the instant case counsel for defendant admitted that the writ of mandamus would lie in the instant case if defendant delayed the payment of the relator's judgment an "unreasonable time." Counsel further conceded that the trial court in passing upon relator's motion was required to pass solely upon a question of law, and that if its decision was correct defendant was not injured by the refusal of the trial court to grant the change of venue.

We are satisfied that there is no merit in point II. In People ex rel. Dunne v. Downes Grove San. Dist., 361 Ill. 499, 503, the court

said (pp. 429, 430): "The claim has been reduced to a final judgment, and nothing remains to be done except to pay same. Under the circumstances as they exist in this case, it is the duty of the board of trustees of appellant district to take all steps necessary to make payment of the judgment. People v. City of Chicago, 360 Ill. 25; City of Cairo v. Campbell, 116 Ill. 305, 308, 309; City of Cairo v. Everett, 107 Ill. 75, 78; City of Chicago v. Sansum, 87 Ill. 182; People v. City of Cairo, 50 Ill. 154. An evasion of a duty by a public officer or a legal tribunal, amounting to a virtual refusal to perform the duty, warrants a writ of mandamus, and an inferior tribunal which has sought to evade the performance of a positive official duty while convened, cannot, by adjourning its meeting sine die, place itself beyond the power of the court to compel by mandamus the performance of the duty enjoined by law which such tribunal has undertaken to defeat by such evasion. Loewenthal v. People, 192 Ill. 222, 231, 232; Board of Supervisors v. People, 226 Ill. 576. Persons charged with the performance of public duties can have no higher duty than the payment of an honest debt reduced to judgment, and it is not discretionary with any such official whether or not he shall so do. People v. Rice, 356 Ill. 373, 377." (See, also, People v. Kelly, 361 Ill. 54, 59; People v. Village of Bradley, 367 Ill. 301, 307.) In the instant case counsel for defendant stated to the trial court that the village did not want to issue funding bonds to pay relator's judgment alone, but that it was willing to issue funding bonds to pay plaintiff and all other debtors of the village provided relator would reduce its judgment so that a legal bond issue could be made which would pay all of the debts of the village, and that the present debts of the village were in excess of the constitutional limit as to debts. In response to a question by the trial court counsel for defendant stated that none of the other claims against the village had been reduced to judgment, but that the village wanted them paid. As we have already seen, the argument made that the present debts of the village are in excess of the constitutional limit as to debts, was fully answered by our Supreme

said (pp. 429, 430): "The claim has been reduced to a final judgment, and nothing remains to be done except to pay same. Under the circumstances as they exist in this case, it is the duty of the board of trustees of appellant district to take all steps necessary to make payment of the judgment. People v. City of Ontario, 26 III. 431; City of Cairo v. Crawford, 116 III. 393, 394, 399; City of Cairo v. Burnett, 109 III. 73, 78; City of Galesburg v. Hanna, 87 III. 14; People v. City of Cairo, 50 III. 174. An evasion of a duty by a public officer or a legal tribunal, amounting to a virtual refusal to perform the duty, warrants a writ of mandamus, and an inferior tribunal which has sought to evade the performance of a positive official duty while convened, cannot, by adjourning its meeting sine die, place itself beyond the power of the court to compel by mandamus the performance of the duty enjoined by law which such tribunal has undertaken to defeat by such evasion. Lowenthal v. People, 192 III. 422, 431, 432; Board of Supervisors v. People, 226 III. 576. Persons charged with the performance of public duties can have no higher duty than the payment of an honest debt reduced to judgment, and it is not discretionary with any such official whether or not he shall so do. People v. Bice, 196 III. 371, 377." (See, also, People v. Raftis, 241 III. 24, 37; People v. Village of Bradley, 367 III. 302, 307.) In the instant case counsel for defendant stated to the trial court that the village did not want to issue funding bonds to pay relator's judgment alone, but that it was willing to issue funding bonds to pay plaintiff and all other debtors of the village provided relator would reduce its judgment so that a legal bond issue could be made which would pay all of the debts of the village, and that the present debts of the village were in excess of the constitutional limit as to debts. In response to a question by the trial court counsel for defendant stated that none of the other claims against the village had been reduced to judgment, but that the village wanted them paid. As we have already seen, the argument made that the present debts of the village are in excess of the constitutional limit as to debts, was fully answered by our Supreme

court in Elmhurst Bank v. Village of Bellwood, supra (p. 206), where the court stated: "The great majority of courts hold that the issuance of bonds by a municipality for the purpose of funding its valid indebtedness does not increase its aggregate indebtedness within the meaning of constitutional provisions similar to ours. (97 A.L.R. 442n.) In Kocsis v. Chicago Park District, 362 Ill. 24, 35, we followed that view and said: 'The issuance of refunding and funding bonds does not create additional indebtedness but merely evidences existing debts. (County of Jasper v. Ballou, 103 U.S. 745; Powell v. City of Madison, 107 Ind. 106; Hotchkiss v. Marion, 12 Mont. 218; Hamilton County v. Montpelier Savings Bank and Trust Co., 157 Fed. 19.) The Circuit Court of Appeals for the seventh circuit, in the case last cited, in referring to the constitutional provision in question, said: "The constitutional limitation relates solely to the creation of indebtedness thereafter, and neither authorizes repudiation, nor affects the making of terms for payment of existing legal liabilities. The funding of such liabilities, therefore, authorized by statute and vote, was unaffected by the limitation, and the fact alone that the issue of funding bonds thereupon exceeded that limit neither implies nor amounts to violation of the constitutional provision." It necessarily follows that no additional indebtedness will be created by the refunding of the bonds and the funding of the floating indebtedness of the superseded park districts.'" In the instant case, defendant's verified answer stated that all revenues from the tax levy for general corporate purposes and from other sources have been and will be insufficient to pay the necessary, reasonable and most economical corporate expenditures, and the trial court, in passing upon plaintiff's (relator's) motion, had to assume that this statement was true, and he was justified, therefore, in commanding the village to issue the bonds in question and to deliver them to plaintiff (relator) and to levy taxes for the payment of the bonds. The judgment order recites that relator is willing to receive the bonds as payment for its judgment. Both in the trial court and in this court the attitude

court in Hammond bank v. Village of Maywood, supra (p. 306), where the court stated: "The great majority of courts hold that the issuance of bonds by a municipality for the purpose of funding its valid indebtedness does not increase its aggregate indebtedness within the meaning of constitutional provisions similar to ours. (27 A.L.R. 442n.) In Kanaly v. Oakwood Park District, 343 Ill. 24, 29, we followed that view and said: 'The issuance of refunding and funding bonds does not create additional indebtedness but merely evidences existing debts. (County of Adams v. Bailey, 103 U.S. 743; Powell v. City of Bellaire, 107 Ind. 106; Schubkegel v. Wrubel, 12 Wash. 438; Hamilton County v. Mechanics Savings Bank and Trust Co., 137 Ind. 19.) The circuit court of Appeals for the seventh circuit, in the case last cited, in referring to the constitutional provision in question, said: "The constitutional limitation relates solely to the creation of indebtedness thereafter, and neither authorizes repudiation, nor affects the making of terms for payment of existing legal liabilities. The funding of such liabilities, therefore, authorized by statute and vote, was unaffected by the limitation, and the fact alone that the issue of funding bonds thereupon exceeded that limit neither implies nor amounts to violation of the constitutional provision." It necessarily follows that no additional indebtedness will be created by the refunding of the bonds and the funding of the floating indebtedness of the aforesaid park districts.'" In the instant case, defendant's verified answer stated that all revenues from the tax levy for general corporate purposes and from other sources have been and will be insufficient to pay the necessary, reasonable and most economical corporate expenditures, and the trial court, in passing upon plaintiff's (relator's) motion, had to assume that this statement was true, and he was justified, therefore, in commanding the village to issue the bonds in question and to deliver them to plaintiff (relator) and to levy taxes for the payment of the bonds. The judgment order recites that relator is willing to receive the bonds as payment for its judgment. Both in the trial court and in this court the existence

of the defendant was to secure what it called "reasonable time" in which to pay the judgment. It has had reasonable time to pay it.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

40633

FRIEDA ROSINSKI,
Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

305 I.A. 626

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action under the double indemnity provision of a life insurance policy issued by defendant on the life of Herman Piper. Defendant paid the face amount of the policy to plaintiff but denied that it was liable under the double liability provision of the policy. A jury returned a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of $483.35. Defendant appeals.

The double liability provision of the policy provided that if the insured sustained "bodily injuries, solely through external, violent and accidental means, resulting, directly and independently of all other causes, in the death of the Insured * * * the Company will pay in addition to any other sums due under this Policy and subject to the provisions of this Policy an Accidental Death Benefit equal to the face amount of insurance then payable at death."

Plaintiff's theory was that the death of the insured was caused solely by external, violent and accidental means. Defendant's theory was that the insured's death was not caused solely through external, violent and accidental means, directly or independently of all other causes, but that disease and infirmities of the insured contributed to his death.

The insured, Herman Piper, died on March 18, 1937, at the County hospital. He was in a state of coma when he was brought into the hospital.

Defendant contends: "The burden was on the plaintiff to prove that death was the result, directly and independently of all other causes, of bodily injury sustained solely through external,

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Plaintiff's theory was that the death of the insured was caused solely by external, violent and accidental means. Defendant's theory was that the insured's death was not caused solely through external, violent and accidental means, directly or independently of all other causes, but that disease and infirmities of the insured contributed to his death.

The insured, Herman Piper, died on March 13, 1937, at the County hospital. He was in a state of coma when he was brought into the hospital.

Defendant contends: "The burden was on the plaintiff to prove that death was the result, directly and independently of all other causes, of bodily injury sustained solely through external,

violent and accidental means. The plaintiff failed to meet this burden which is a condition precedent to recovery. II. Disease and infirmities of the insured contributed to his death, thereby barring recovery by plaintiff under the terms of the policy." Upon the oral argument counsel for defendant stated that point I was intended as a contention that plaintiff had failed to make out a prima facie case that the insured came to his death from bodily injuries sustained solely through violent and accidental means. The brother of the insured testified that on an average of once a week during the last year of the insured's life he saw the insured, and that during that year the witness "saw no signs of ill health;" that the last time the witness saw the insured was on March 16 and that at that time his condition was the same. Dr. Kearns, the physician, surgeon and pathologist for the coroner of Cook county, testified for plaintiff. Defendant admitted the doctor's qualifications. The doctor testified that in March, 1937, he performed a post mortem on the body of the insured; that "the external examination revealed a well developed white male, 41 years of age, 5 feet 9 inches tall, and weighing 175 pounds;" that when he reflected the scalp to examine the contents of the head, he "found no fracture of the skull, but found an extensive hemorrhage between the outer covering of the brain and the brain, a subdural hemorrhage, on both sides behind this part of the head (indicating) and on the right side over this part of the head (indicating); in other words, over the parieto occipital area on both sides and the temporal area on the right side. In addition to this, there were punctate hemorrhages in the brain in the middle convolution of the parietal lobe on the right side; and in the part of the brain through which the tracts, the nerve tracts pass, the superior cerebral peduncles on both sides, there were also hemorrhages." The doctor further testified that from the conditions he found in the brain he was of the opinion, based on reasonable medical certainty, "that the changes in the brain were the result of injury, external violence;" that, in his opinion, "these injuries of the brain were the cause of death." The witness was not

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cross-examined. We hold that plaintiff made out a prima facie case that the insured came to his death from bodily injuries sustained solely through external, violent and accidental means, and that the instant contention of defendant is without merit.

As to the second contention: Plaintiff having made out a prima facie case that the insured came to his death from bodily injuries sustained solely through external, violent and accidental means, the burden was then upon defendant to show that disease and infirmities contributed to his death. (See Malty v. Federal Casualty Co., 245 Ill. App. 180, 185; Rogers v. Prudential Ins. Co., 270 Ill. App. 515, 525.) Defendant seeks to sustain its second contention by the testimony of Dr. Samuel L. Schreiber, who, at the time the insured was in the County hospital, was a junior resident interne. He was not a licensed physician at the time, in fact, was not licensed until about a year after the death of the insured. He testified that after the insured was brought to the hospital he made a complete examination of the insured; that "there was a - on his head there was a bruise over the right frontal bone;" that "my impression in the case was alcoholic coma with alcoholic gastritis, subarachnoid hemorrhage, tentative etiology, either some form of injury, hypertension or aneurysm of the head, a tentative diagnosis of ruptured aneurysm in the head * * * or in the spinal column; passive congestion of the kidneys, and hemorrhoids;" that he "drew a Wasserman * * * and sent it to the laboratory, and it was returned positive for syphilis * * * that syphilis will cause such a venous thrombosis of the head, with a period of unconsciousness, period of coma, such as this man was in." The following then occurred: "Q. And this venous thrombosis you found, was that sufficient to kill a man? A. I don't know what the Coroner found at the postmortem; but syphilis will cause venous thrombosis. I am assuming pathological entities will occur with syphilis." The witness further testified that the conditions he found could very well contribute to the insured's death. Upon cross-examination the witness was asked the following question: "Q. Assuming you had done a

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skilful job, and there was blood in this fluid, you couldn't tell from the nature of your test whether that blood came from the laceration of the brain or whether it came from the venous thrombosis, as you say? A. No, that is true." The witness further testified that he did not examine the brain; that the brain was sent to the corner for post mortem; that "the correctness [of the physical finlings] * * * is determined by the postmortem findings." We have carefully read the entire evidence of Dr. Schreiber and we are satisfied that the jury and the trial court were justified in finding that it did not prove that "disease and infirmities" contributed to the death of the insured. Indeed, as the witness was not a licensed phyician at the time that he saw the insured in the County hospital, it is somewhat surprising that plaintiff's counsel did not object to the opinion evidence of the doctor. It is to be noted that the doctor admitted that the correctness of his opinion would be determined by the post mortem findings.

Under the record in this case the question whether the insued died as the result of bodily injuries sustained solely throgh violent and accidental means was a question of fact for the ury, and we are entirely satisfied with their finding.

The judgment of the Municipal court of Chicago is affined.

JUDGMENT AFFIRMED.

Sullvan, P. J., and Friend, J., concur.

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Under the record in this case the question whether the insured died as the result of bodily injuries sustained solely through violent and accidental means was a question of fact for the jury, and we are entirely satisfied with their finding.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

**RESERVE BOOK**

Ill. Unpublished Opinion

305

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